

VERBATIM ¹RECORD OF TRIAL ²

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

Headquarters and
Headquarters Company,
United States Army Garrison
(Unit/Command Name)

(Social Security Number)

U.S. Army

(Branch of Service)

PFC/E-3

(Rank)

Fort Myer, VA 22211

(Station or Ship)

By

GENERALCOURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

Date or Dates of Trial:

23 February 2012, 15-16 March 2012, 24-26 April 2012, 6-8 June 2012, 25 June 2012, 16-19 July 2012, 28-30 August 2012, 2 October 2012, 12 October 2012, 17-18 October 2012, 7-8 November 2012, 27 November - 2 December 2012, 5-7 December 2012, 10-11 December 2012, 8-9 January 2013, 16 January 2013, 26 February - 1 March 2013, 8 March 2013, 10 April 2013, 7-8 May 2013, 21 May 2013, 3-5 June 2013, 10-12 June 2013, 17-18 June 2013, 25-28 June 2013, 1-2 July 2013, 8-10 July 2013, 15 July 2013, 18-19 July 2013, 25-26 July 2013, 28 July - 2 August 2013, 5-9 August 2013, 12-14 August 2013, 16 August 2013, and 19-21 August 2013.

¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

~~SECRET~~

1 A. Yes, ma'am.

2

3 Q. Which were--I had asked you questions on the persons at
4 risk, about whether you were--the ones that you were currently--well,
5 actually let me start with that. You said you notified around
6 percent of them. How many did you actually assist--how many
7 wanted assistance?

8 A. Around , Your Honor.

9 Q. people or percent of the percent?

10 A. of those individuals. The number of people we assisted
11 was greater because it included family members and so on. But, of
12 the or so cases, of them involved assistance.

13 Q. And, when that assistance was--well, those people, we
14 are now in 2013, this was begun in 2010. Can you sort of get a
15 flavor about when most of that assistance began?

16 A. I would say most of it, in 2011, because it took us a while
17 to identify, reach out, and then execute, but what is ongoing in
18 that, and one thing I could not say in the open session was

19 So, you have the
20 problem of that work goes
21 on. Some of them have
22 gotten kind of stuck in limbo They

~~SECRET~~

SECRET

1
2 So, that is ongoing work.

3 Q. So, say, as of the beginning of 2013, of those people,
4 how many had assistance started already?

5 A. In terms of--all of them had it started. I mean, it
6 started in 2011 or so. Maybe I am not understanding the question.

7 Q. Maybe I was confused. I thought you said that there was
8 one?

9 A. The one that I was referring to, we have had a case that
10 just came to our attention in the last couple weeks where somebody
11 was arrested and is in jail now. And, the assessment of the embassy
12 and the whole diplomatic corps is because he was named in a WikiLeaks
13 revelation

14 They did not overtly say that
15 that was it, but this was one where the post assumed that their
16 predecessors had named him and it turned out that they had not. So,
17 we are having to start that case from the beginning.

18 Q. Okay. So, this is one that should have been talked to and
19 was not.

20 A. Correct.

21 Q. Okay, you talked earlier about these--sometimes it wasn't
22 the initial dump of the cables that created the interest, it was the

SECRET

~~SECRET~~

1 follow-on media that would be now targeted to the region in that
2 particular language saying what the cables said?

3 A. Yes.

4 Q. And that would be after the release at some point. Are you
5 still seeing that occurring?

6 A. Yes, because, as I was mentioning, what happens is--it is
7 not very interesting, I guess, after the initial surge of, "Oh, isn't
8 this neat, there was this leak of all this information." The media
9 stopped focusing on WikiLeaks itself. What they will do now is, when
10 they are writing a story about, you know, a political leader or a
11 person or something in another country, they will go back and do
12 research using that database and if they can find something that a
13 U.S. official said about them or something, they include that in the
14 story. So, if they are making a story saying three people say this
15 guy is corrupt, they will say, "Oh, and the US Embassy assessed them
16 as being corrupt as well." But, it is not something where they would
17 write a story just based on--

18 Q. So, I guess that is where I am getting a little confused.
19 I thought I understood your testimony to be that most of these
20 people that required assistance began to get it in 2011 and now that
21 we have these media things coming out, are new people coming in
22 requesting assistance, or not?

~~SECRET~~

~~SECRET~~

1 A. No. We haven't had one in a while but there was a flurry
2 of that in sort of late 2011, early 2012 as the media hit. But, the
3 ones now where it is coming out, I don't think it has been too much--
4 hopefully, we did, with this one exception I mentioned, we did a good
5 enough job that we anticipated this and got people out of harm's way.

6 MJ: All right, thank you. Any follow-up based on that?

7 TC[MAJ FEIN]: No, ma'am.

8 ADC[CPT TOOMAN]: No, Your Honor.

9 MJ: Okay, temporary or permanent excusal?

10 TC[MAJ FEIN]: Temporary, Ma'am.

11 [The witness was temporarily excused, duly warned, and withdrew from
12 the courtroom.]

13 MJ: All right, with respect to this witness the Court will
14 accept his expertise to educate the Court about his job and how the
15 persons at risk working group works, but as far as that opinion on
16 the, "chilling," it is too speculative based on what he is basing it
17 on so I am going to sustain the objection on the opinion. So, I am
18 going to disregard it.

19 TC[MAJ FEIN]: Yes, ma'am.

20 MJ: Anything else we need to--and I have already got it in my
21 notes right next to that to disregard it.

22 Anything else we need to address?

~~SECRET~~

~~SECRET~~

1 CDC[MR. COOMBS]: No, Your Honor.

2 TC[MAJ FEIN]: No, ma'am.

3 MJ: Okay so, 10 o'clock in the morning is what we are going for
4 on Monday?

5 CDC[MR. COOMBS]: Yes, Your Honor.

6 TC[MAJ FEIN]: Yes, ma'am.

7 MJ: Court is in recess until 10 o'clock in the morning.

8 [The court-martial recessed at 1538, 2 August 2013.]

~~SECRET~~

1 [The court-martial was called to order at 1003, 5 August 2013.]

2 MJ: Court is called to order. Major Fein, please account for
3 the parties.

4 TC[MAJ FEIN]: Yes, ma'am. All parties when the Court last
5 recessed are again present with following exceptions; Captain
6 Overgaard is present, and Mr. Chavez, the court reporter is present.
7 Mr. Robertshaw is absent.

8 MJ: All right. Have there been any new exhibits added to the
9 appellate exhibit list?

10 TC[MAJ FEIN]: Yes, ma'am. Ma'am, Appellate Exhibit 632 is the
11 prosecution's response to the defense motion to merge Specifications
12 5 and 7 of Charge II, dated 2 August 2013. Appellate Exhibit 633 is
13 prosecution response to the defense motion to merge Specifications 4
14 and 6 of Charge II, dated 2 August 2013. And Appellate Exhibit 634
15 is prosecution -- is the prosecution's response to defense motion to
16 merge as unreasonable multiplication of charges for sentencing, dated
17 2 August 2013.

18 MJ: All right --

19 TC[MAJ FEIN]: Also, Your Honor -- oh, I'm sorry.

20 MJ: Go ahead.

21 TC[MAJ FEIN]: As of 0945 this morning, there were ten members
22 of the media at the media operations center, one stenographer,
23 there's no media in the courtroom, 19 -- and 19 spectators in the

1 courtroom. Currently, the overflow trailer is not being used but is
2 available if needed.

3 MJ: All right. Thank you. I also received an e-mail from
4 defense counsel over the weekend with respect to the unreasonable
5 multiplication of charges for findings motions. I believe it was
6 Specifications 4 and 6 of Charge II that are at issue.

7 CDC[MR COOMBS]: That is correct, Your Honor. And after our 802
8 session, I spoke with the government. I believe what we'll do is put
9 together a stipulation of expected testimony in order to highlight
10 the -- the issue that the defense believes was brought out in the
11 government's response motion.

12 MJ: All right. And does either side desire oral argument with
13 respect to that motion?

14 CDC[MR COOMBS]: I think once the -- yes, the defense would, Your
15 Honor.

16 MJ: All right. So we'll have to have a time that we build that
17 in. What I'd like to do is get through the witnesses -- maybe get to
18 the witness today, and this afternoon perhaps -- or if that doesn't
19 work, maybe we can do it tomorrow. The court will hold the -- that
20 ruling in abeyance pending oral argument.

21 CDC[MR COOMBS]: This afternoon will be fine for the defense,
22 Your Honor.

23 MJ: All right. Government?

1 TC[MAJ FEIN]: That would be fine, ma'am. We can, at lunchtime,
2 start working on the stip.

3 MJ: Once again, counsel and I met in a brief R.C.M. 802
4 conference before we started today to discuss logistics and other
5 issues that arise in cases. And I advised counsel that I'm
6 finalizing my ruling with respect to the defense motion for
7 appropriate relief under R.C.M. 1001(b)(4), but for the way ahead,
8 I'm going to read a portion of the ruling now because it is germane
9 as we proceed.

10 "Basically, conclusions of law, procedures forward. The
11 Court cannot determine if government proffered evidence is admissible
12 aggravation under R.C.M. 1001(b)(4) unless the court knows what the
13 evidence is. If this were a trial before members, the Court would
14 address these issues by holding an Article 39(a) session outside the
15 presence of the members with each witness. The court would hear the
16 testimony, argument from counsel and rule on what, if any, of the
17 testimony was admissible as aggravating evidence under R.C.M.
18 1001(b)(4). Since this case is a judge alone trial, there are no
19 Article 39(a) sessions during the trial. The Court sits in its
20 interlocutory capacity to evaluate what evidence should be introduced
21 in its sentence imposing authority, when considering only
22 appropriately admitted evidence for its proper purpose.

23 (2) The following procedure will be followed for all remaining

1 government witnesses for whom the government intends to qualify as an
2 expert.

3 (A) The government will begin by identifying the scope of
4 the expertise for which the government seeks to qualify the witness
5 followed by the ultimate opinion the government seeks from the
6 expert.

7 (B) The defense may object and voir dire the witness after
8 the government lays the foundation for the witness.

9 (C) The government may lay the foundation for the expert's
10 opinion to include any admissible evidence in accordance with M.R.E.
11 703. The government will not introduce any hearsay or other facts or
12 data that is not admissible evidence in support of the expert
13 opinion.

14 (D) The Defense may object during the scope of the
15 witness's testimony and articulate the reasons for the objection.

16 (E) The Court will listen to the evidence in its
17 interlocutory capacity. The Court will summarily rule on clearly
18 inadmissible testimony. After the witness has testified, the defense
19 will identify for the Court the areas of the testimony the defense
20 finds objectionable and why. There may be a need for a classified
21 supplement.

22 (F) The Government will provide its position to the Court
23 regarding each defense objection.

1 (G) The Court will examine the testimony and rule on each
2 objection lodged by the defense. When acting in its sentencing
3 imposing role, the Court will not consider any testimony or evidence
4 ruled to be inadmissible aggravation evidence.

5 (H) Unless either party wishes to rely on additional legal
6 authority not briefed in the filings for this motion, the list and
7 response need state only the objections and the reason the testimony
8 or evidence should or not should be admitted."

9 Does either side have any question about that procedure?

10 CDC[MR COOMBS]: No, Your Honor.

11 TC[MAJ FEIN]: No, ma'am.

12 MJ: All right. Is there anything else we need to address
13 before we call the witness?

14 TC[MAJ FEIN]: No, ma'am.

15 CDC[MR COOMBS]: No, Your Honor.

16 MJ: Please call the witness.

17 TC[MAJ FEIN]: Ma'am, the United States calls the Under
18 Secretary of State for Management Patrick Kennedy.

19 [END OF PAGE]
20

PATRICK KENNEDY, civilian, was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the trial counsel [MAJ FEIN]:

Q. Sir, you are the Under Secretary of State for Management Patrick Kennedy?

A. Yes, sir.

Q. And, sir, what does your current position entail as the Under Secretary of Management?

A. I am responsible for the operational aspect of the State Department; telecommunications, information technology, records, finance, budget, security, medical, personnel and logistics.

Q. And, sir, how long have you been in the current position -- in your current position?

A. I've been in the position since November of 2007.

Q. And, sir, you are here today to discuss your expertise in the management and operations of the Department of State?

A. Correct, Major.

Q. And, sir, you are also here to discuss your expertise in the use of diplomatic reporting by U.S. policymakers?

A. Correct.

Q. And, sir, given that expertise, are you also here today to give your opinion on the impact of PFC Manning's criminal conduct on

1 the management and operations of the Department of State?

2 A. Correct.

3 Q. And also the impact of Private First Class Manning's
4 criminal conduct on the -- on the diplomatic reporting use by U.S.
5 policymakers?

6 A. Correct.

7 Q. Thank you, sir. Sir, before we continue, if either party
8 or the Court asks you a question that requires a classified answer,
9 please notify the Court. There's no expectation here in this court-
10 martial that that classified information be discussed in the open.

11 A. Thank you.

12 Q. Sir, how does one become the Under Secretary of State for
13 Management?

14 A. That is a presidential appointment. I have been a Foreign
15 Service officer for 40 years, and I was probably at the point -- in
16 2007, I think, I was the senior career management officer in the
17 State Department, and I was recommended to the then Secretary of
18 State, Secretary Rice, by the then deputy Secretary of State, John
19 Negroponte.

20 Q. Sir, and where does your current position fall within, for
21 instance, an organizational chart within the Department of State?

22 A. You have the Secretary of State, you have two deputy
23 Secretaries of State, and then you have six under Secretaries of

1 State. So it's, in effect, the third operational tier in the State
2 Department.

3 Q. And, sir, are you a member of the Senior Foreign Service?

4 A. I am.

5 Q. And how many years have you been a member of the Senior --
6 or the Foreign Service, sir?

7 A. I've been a member of the Foreign Service since 1973. So a
8 little over 40 years.

9 Q. And what is your rank, sir, in the Foreign Service?

10 A. The rank is called Career Minister. It is the -- it is
11 equivalent of the Senior Executive Service, and in military parlance
12 it would be -- the protocol equivalent of a three-star general.

13 Q. Sir, in your current position, do you have any specific
14 delegations as it pertains to Executive Order 13526 and its preceding
15 orders?

16 A. I am the responsible official for classification for the
17 Department.

18 Q. And where does that authority -- your specific as the
19 senior agency official derive from?

20 A. It derives from a delegation of authority from the
21 Secretary of State.

22 Q. And, sir, does that include having essentially, as we would
23 call it, command and control over the different information systems

1 and information management systems?

2 A. Yes.

3 Q. That also involves classified information, sir?

4 A. Yes.

5 TC[MAJ FEIN]: Your Honor, before going through Under Secretary
6 of State Kennedy's entire background, the United States offers Under
7 Secretary of State for Management Patrick Kennedy as an expert in the
8 field of management and operations in the Department of State and
9 expert in the use of diplomatic reporting by U.S. policymakers.

10 CDC[MR COOMBS]: No objection, Your Honor.

11 MJ: Okay.

12 TC[MAJ FEIN]: One moment, please.

13 MJ: Does that truncate the foundation?

14 TC[MAJ FEIN]: Say again, ma'am.

15 MJ: That can truncate the foundation?

16 TC[MAJ FEIN]: It will be truncated, ma'am.

17 **Questions continued by the trial counsel [MAJ FEIN]:**

18 Q. Sir, rather than going through your almost 41 years of
19 experience in the Department of State, I'd like to ask a few
20 questions about key jobs you've held at the Department. Sir, when
21 did you first become -- when did you first assume a job within the
22 assistant secretary or the secretary's office level?

23

1 A. I was a -- became the Assistant Secretary of State for
2 Administration in 1993 and served in that position until 2001.

3 Q. And what were your general responsibilities, sir, as the
4 Assistant Secretary of State for Administration?

5 A. It included oversight of information technology,
6 classifications, and records management, oversees buildings
7 operations, logistics.

8 Q. And, sir, after being the Assistant Secretary of State for
9 Administration, what position did you hold?

10 A. I then became one of the U.S. representatives to the United
11 Nations, and served in that position from 2001 to 2005.

12 Q. And during that time, sir, did you have any overseas
13 details or other duties?

14 A. Twice; once in 2003 and once in 2004, for six and a half
15 months and three and a half months, respectively. I was detailed to
16 Iraq, first, as the Chief of Staff for the Coalitional Provisional
17 Authority, and the then second time in 2004 as the Chief of Staff for
18 the transition unit in Iraq -- the transition from CPA and defense to
19 American embassy.

20 Q. And, sir, have you ever been detailed as a Department of
21 State senior Foreign Service officer to the Office of Director of
22 National Intelligence?

23 A. Yes.

1 Q. And in what capacity, sir?

2 A. In -- in -- from 2005 to 2007, I was the Deputy Director of
3 National Intelligence for Management.

4 Q. And why, sir, ultimately were you selected for that job at
5 ODNI?

6 A. Because I was a senior management officer, and because the
7 to-be-named first director of national intelligence, John Negroponte,
8 had been -- had been my supervisor both at the United Nations -- U.S.
9 missions with United Nations and in Iraq.

10 MJ: I'm sorry, sir, what was the year that that occurred?

11 WIT: 2005 to 2007.

12 MJ: Thank you.

13 Q. And, sir, can you generally describe for the court your
14 responsibilities as a Deputy Director for National -- of National
15 Intelligence for Management?

16 A. I essentially had two responsibilities; the office of the
17 Director of National Intelligence was set -- was just being set up.
18 So someone had to set up the personnel system, the financial systems,
19 the IT, and bring in the positions that the Intelligence Reform and
20 Terrorism Prevention Act required to be merged into the -- into the
21 Office of the Director of National Intelligence, and then set up
22 processes and make sure that the office was established and running
23 and then, additionally, oversee the logistics, the finance, the

1 information management, the personnel systems of the ODNI.

2 Q. Sir, after May of 2007, what job did you move back when you
3 returned to the Department?

4 A. When I returned to the Department, I was briefly the
5 Director of Management Policy Rightsizing and Innovation from the
6 Department for -- for several months until I was nominated to be
7 Under Secretary of State for Management.

8 Q. And what were your general responsibilities, sir, within
9 the Office of Management Policy, Rightsizing and Innovation?

10 A. The office is essentially a senior level staff arm; a mini
11 think tank that oversees the development of management policies,
12 works with other U.S. Government agencies on the correct numbers and
13 staffing of American embassies' consulates and other offices
14 throughout the world, and then heads a unit that works within the
15 Department to look for innovative ways to improve all aspects of
16 management and operations.

17 Q. Thank you, sir. And, sir, have you ever taught in the
18 field of management and operations of the Department?

19 A. Not formally. The State Department has the national
20 foreign affairs training center, the Foreign Service Institute, and I
21 have been an adjunct faculty there, which simply means you give
22 lectures on subject matter. Mine was on logistics and that was back
23 in the 1900s. And I give lectures there on a regular basis to either

1 in-service or new -- newly appointment classes.

2 Q. And, sir, the ones -- the lectures you give today and in
3 recent time, what was the general subject areas?

4 A. The general subject is the overall management and
5 operations of the State Department.

6 Q. Sir, have you also test -- or have you testified in the
7 Field of Information Management within the Department of State?

8 A. Yes, both when I was assistant Secretary of State for
9 Administration, and now in my position as Under Secretary for
10 Management. I testify regularly before the Congress either in formal
11 sessions in open and closed briefings. And among the subjects that I
12 cover, since it is within my responsibility, is information
13 management.

14 Q. And, sir, using the term information management, what does
15 that mean, sir?

16 A. Information management has really several parts to it. It
17 is the management of the information itself, which is the records
18 management, the classifications of it, and then, also, computer
19 systems operations and, lastly, long-haul -- long-haul technology.

20 Q. And, sir, have you ever had personal experience in your
21 career with information management operations?

22 A. As a -- as a management officer both in Africa, when I
23 served there in the 1970s, and in Cairo, where I was Chief of --

1 Chief of Administration -- Chief of Management at the American
2 Embassy in Cairo, the information management section within the
3 embassy reported directly to me.

4 Q. And, sir, can you please describe for the court -- you've
5 used the term, I think, reporting -- what reporting means?

6 A. It is the State Department's -- one of the State
7 Department's major responsibilities in the national security arena is
8 to have officers who are expert in political reporting, economic
9 reporting, public diplomacy, as well as counselor and administration
10 assigned to American embassies, consulates and other missions around
11 the world, whose duties are to engage with foreign government
12 officials and foreign non-officials; NGOs, business community, et
13 cetera, and to prepare reports and then append analysis to them to
14 advise Washington on trends, circumstances, and events in foreign
15 nations so that information can then serve Washington policymakers in
16 developing the -- the best strategy for national security.

17 Q. Sir, have you, in your career, been a consumer of State
18 Department reporting?

19 A. I have been ever since I was in -- I would say I was in a
20 supervisory position, which was probably starting in 1985, when I
21 became a -- the Executive Director and then Deputy Executive
22 Secretary in the Department of Secretary, which is the office that
23 directly supports the Secretary of State.

1 Q. And, sir, during your career, have you also had experience
2 how U.S. government policymakers used Department of State reporting?

3 A. Absolutely, both in -- as a senior management official, I
4 see that the actions that Department officials take on a worldwide
5 basis across a full range of issues is impacted heavily by the
6 reporting and analysis that is provided them -- the information that
7 is provided them by our -- by our offices in the field and also by
8 our personnel in Washington, who engage with -- with foreign
9 delegations, with foreign -- with foreign embassies, and others as
10 well.

11 Q. And, sir, can you briefly describe for the court the
12 different types of positions you've held where you've experienced how
13 policy -- U.S. policymakers use Department of State reporting?

14 A. Certainly. In my current position as Under Secretary for
15 State For Management, it is my responsibility to -- to determine
16 where the resources of the State Department -- the financial and
17 human resources to -- are going to be applied, where we might need to
18 construct new facilities, where new posts might be open, what
19 security steps may or may not have to be taken to protect -- to
20 protect our personnel, where -- where the economic trends may be
21 going overseas which would impact foreign exchange rates. It would
22 have an impact on how -- how the budget office of the State
23 Department prepares its budget or how our financial operations work

1 and, in all of those activities, the reporting and analysis submitted
2 by -- by our posts overseas inform us of -- of where we may need to
3 increase resources, where we might need to -- to reduce resources,
4 how we -- how we budget, and how we protect.

5 Q. And, sir, have you ever been required or have you ever
6 represented Department of State on official matters within the U.S.
7 government?

8 A. Yes. I regularly engage in inter-agencies' activities up
9 and to representing the State Department on the deputy's committee of
10 the national security staff.

11 Q. Sir, now I'd like to focus this next portion of your
12 testimony on the actual -- on the department's first response to the
13 WikiLeaks disclosures. Sir, do compromises in classified State
14 Department information -- does that fall within your scope of
15 responsibility?

16 A. It does.

17 Q. And were you made aware, sir, of the compromise of the
18 Reykjavik cable in back in March of 2010?

19 A. I was.

20 Q. And did the Department take any actions, investigate or
21 response, to the compromise of that reported cable?

22 A. Yeah. Our diplomatic security service, which is the
23 security arm of the State Department, worked with -- worked with

1 other elements of the United States government to determine what the
2 source of that -- of that leak might have been.

3 Q. Sir, in the summer of 2010, when the Department of Defense
4 information started to be publicly released, did you take any steps
5 within the Department of State in response to that disclosure?

6 A. Yes. We had a liaison officer assigned to the task force
7 that was under the direction of Brigadier General Carr. We also
8 assembled a -- a database that was posted to the State Department's
9 intranet classified website of all of the cables we thought might be
10 incorporated in such a -- in such a -- in such a leak, and then we
11 advised our embassies, consulates, and other posts around the world
12 to go to this -- go to this intranet website and to review the cables
13 that they had written, because it was organized by source, and also
14 advised the departmental bureaus -- the departmental operating units
15 that would also have been the sources of cables outbound from the
16 State Department to -- to review material that they would have
17 generated.

18 Q. So, sir, you mentioned the Department of State cables --
19 we'll get to that in a moment -- but going back to the Department of
20 Defense information, why did the State Department dedicate any
21 resources to the original DoD effort -- with the DoD information?

22 A. Because there was -- there was reason to believe that
23 summary material from State Department diplomatic reporting and

1 analysis cables was incorporated into some of the DoD material.

2 TC[MAJ FEIN]: Hold on, please, sir.

3 [Pause]

4 Q. Sir, what point in the summer of 2010 did you become the
5 senior State Department official for all matters of WikiLeaks?

6 A. After -- after briefing -- after briefing the Secretary of
7 State and my senior colleagues on the information that we were
8 receiving, I was designated to -- to lead the departmental efforts in
9 this regard.

10 Q. And why, sir -- prior to the Thanksgiving timeframe, why
11 was it necessary to be briefing even the Secretary on the ongoing
12 Department of Defense compromises of information?

13 A. Because there was, I said, reason to believe and then
14 evidence that certain State Department materials -- certain summaries
15 of State Department reporting and analysis was -- was contained in
16 the -- in that Department of Defense material, and then simply in
17 order to get prepared for the -- and should -- should other State
18 Department material be at -- be at risk.

19 Q. So, sir, in the time between summer of 2010 and before
20 Thanksgiving of 2010, were you aware of any additional Department of
21 State classified information that could potentially have been
22 compromised to WikiLeaks?

1 A. There was -- there was -- we were provided with information
2 from the Department of Defense that indicated that their review of --
3 of material indicated that there could be a large quantity of State
4 Department material, potentially up to 250,000 reporting cables.

5 Q. So, sir, at that time -- the time between summer of 2010
6 and before Thanksgiving of 2010, what steps did you take for the
7 Department in respect to the purported NCD cable compromise?

8 A. What we did was assemble a -- a -- a file -- a searchable
9 file on the State Department's classified intranet; our internal
10 classified system, and then advised all ambassadors and deputy chiefs
11 of mission, our number two officer at an embassy, to -- of the
12 location of this file, so to speak, on our website, and ask them to
13 acquaint themselves with this material, and to -- to read through it
14 and be prepared to -- to analyze what the potentially deleterious
15 impacts were, and at the same time addressing the same instruction to
16 all assistant secretaries and office directors within the State
17 Department whose bureaus or offices might also be generating the
18 outgoing material that was contained -- that had generated the
19 outgoing material that was in that file.

20 Q. So, sir, why, at this time, prior to Thanksgiving of 2010,
21 was the direction simply to acquaint themselves with the purported
22 cables?
23

1 A. I think there were two reasons. The first is that the
2 State Department is a rather small organization with -- with over 280
3 posts around the world -- wide responsibilities -- and to divert
4 resources -- additional resources, large resources to any further
5 review when it was not yet absolutely clear that those -- that State
6 Department material was going to be released would have been an
7 aversion and waste of very, very scarce human and other resources.
8 And, secondly, obviously we would not wish to engage with any of the
9 other nations involved in advance. It would have been premature to
10 engage with another nation about what might or might not be contained
11 in -- in a leak or a purported leak without -- without being
12 absolutely sure. That would have been premature, if not stupid.

13 Q. So, sir, what actions did the Department take around
14 Thanksgiving of 2010 upon learning that the public release of the
15 purported cables was imminent?

16 A. The Department -- the Department notified -- notified all
17 posts of this, and asked them to reacquaint themselves with all of
18 this material, to carefully analyze what might be -- might be leaked
19 or become a purported leak, and then to prepare -- prepare guidance
20 for Washington on potential host government/host nation reaction to
21 that material.

22 Q. Sir, did you, as the Under Secretary, have to brief the
23 Secretary of State?

1 A. Yes, I did.

2 Q. And why, sir?

3 A. Because, obviously, this is a huge -- it's a huge effort
4 because State Department reporting and analysis is incredibly
5 important to the national security, and also our reporting and
6 analysis is based, to a great extent, on our ability to inter --
7 interface -- to work with foreign government officials and other
8 foreign nationals in the private sector of all kinds. They have an
9 implicit belief that -- that there is a confidentiality and a privacy
10 with what they would say to us, and the breach of that privacy would
11 have a significant and deleterious impact on our operations. And,
12 secondly, also, just perchance, the Secretary of State was about to
13 embark on an overseas travel to -- to two -- two major conferences
14 where she would be seeing many -- many -- many senior foreign
15 leaders.

16 Q. So, sir, could you please very briefly describe your
17 specific role around that Thanksgiving timeframe with the -- as the
18 purported cables were being released to the public?

19 A. Certainly. I worked with -- with the Executive Secretary
20 of the Department. The Executive Secretary, using almost a Thomas
21 Jeffersonian term, is the Chief Clerk of the Department; the
22 individual who coordinates process and operations of paper flow and
23 briefing materials within the Department. And the Department, as a

1 matter of course, when it is faced with a -- with a serious crisis,
2 sets up a task force. We set up a task force -- we set up a mita --
3 a task force to review and deal with material. We set up a
4 mitigation task force. And we set up a "persons at risk" task force.
5 And so my responsibility was to make sure, working with the Executive
6 Secretary, that those processes were started, and that they had the
7 resources necessary that we had to pull from throughout the
8 Department to staff them because the Department has no -- has no
9 excess -- in fact, has no reserve or National Guard to call forward
10 and call up in order to backstop the State Department. It has to
11 pull people, in effect, "off the line" to deal -- to deal with any
12 crisis.

13 Q. So, sir, first, we'd like to talk about the WikiLeaks
14 working group. And for today's testimony, sir, I will not be trying
15 -- or I will not be eliciting any testimony from you about the
16 mitigation team, just the WikiLeaks working group. So, sir, in
17 reference to the WikiLeaks working group, when was that first
18 created?

19 A. The WikiLeaks working group was created around -- around
20 that Thanksgiving timeframe. I don't -- I don't have the exact date
21 in my head. It was composed of representatives at a senior level --
22 the deputy assistant secretary level from every regional bureau, the
23 Bureau of International Organization Affairs, and all the functional

1 bureaus. A functional bureau in the State Department would be the
2 Bureau of Economic and Business Affairs, the Bureau of Oceans,
3 Environmental and Science Affairs, the Counterterrorism Office as
4 well as individuals from various management bureaus who were there in
5 a supporting and advisory role. And its job was to serve as a
6 central hub. We have a -- we have a small suite behind our
7 operations center, our 24-hour command center, the equivalent of the
8 National Military Command Center, in which task force is assemble --
9 when we're in crisis mode, people sit around the table and, as
10 information comes in from other elements of the Department or from
11 overseas, they make sure the information is coalesced, assembled,
12 compared, contrasted, and then briefed to a senior to management
13 along with recommendations for "next steps" that might have to be
14 taken.

15 Q. Sir, you mentioned the term "crisis" a few times.
16 What is a crisis situation in terms of the Department of State?

17 A. The crisis situation of the Department of State can -- can
18 -- is a huge range of activities. You can have a -- you can have an
19 airplane crash with many American citizens onboard. You can have a
20 natural disaster; the Haiti earthquake. You can have something like
21 the tsunami in Japan followed by the -- the damage to the Fukushima
22 power plants. You can have a terrorist attack on the United States
23 embassy. Or you can have any activity that has a deleterious impact

1 on the State Department's operations -- our national security
2 mission, which goes outside of the narrow framework that one bureau
3 or office should and could handle itself. And so a crisis -- a
4 crisis task force is -- is that.

5 Q. So, sir, why was this situation considered a crisis?

6 A. It was considered a crisis because the release of -- of
7 documents that would be purported to be U.S. State Department,
8 classified or unclassified, for that matter, in large quantities,
9 reporting analysis would -- would breach the trust and confidence of
10 our interlocutors overseas. When the State Department officers go
11 out and are looking at the situation in a ho -- in the country in
12 which they are assigned or the international organization to which
13 they are assigned, they're looking at activities that are ongoing.
14 They are talking to -- to other diplomats, to members of the -- the
15 private sector, wherever, and they're assembling -- reporting on that
16 situation and then they're appending analysis to it. Part, and an
17 incredibly important part of that complex undertaking is to
18 understand the opinions, the analysis, the feelings of others, i.e.
19 those outside the State Department or the U.S. government family and,
20 therefore, we will have discussions with host nation, meaning the
21 country in which the embassy is located, diplomats from --from third
22 countries, individuals representing non-governmental organizations.
23 We have full and frank discussions with those individuals. And it is

1 their expectation that those discussions will be treated as private
2 and confidential, and not exposed to -- to -- to everyone because, if
3 that was the case, they would be reticent to provide their full and
4 frank opinions and analysis and share them with us. And then, as
5 we're assembling our reporting analysis, feeding it back to
6 Washington where it becomes one piece of a very large puzzle that is
7 the national security of the United States. The diminution of the
8 value of that reporting is that we're not getting the full and frank
9 opinions of -- of -- of interlocutors expressed to us.

10 Q. So, sir, in reference ----

11 MJ: Hold on just a moment. Yes?

12 CDC[MR COOMBS]: Major Fein, sorry to interrupt you there. Just
13 the last part of Under Secretary Kennedy's answer would be our R.C.M.
14 1001(b)(4) objection.

15 MJ: What timeframe are you talking about -- that's all right --
16 I understand. I've got the objection down.

17 CDC[MR COOMBS]: Yes, ma'am.

18 MJ: What timeframe are you talking about with the diminution?

19 WIT: I'm talking -- I'm talking about the diminution after -- of
20 any leak of classified information. And any leak of classified
21 information that can be attributed to -- to a breach of confidence
22 results in a diminution.

23 MJ: Thank you.

1 Q. And, so, sir, you gave that answer based off the answer of
2 why this was considered a crisis. In your experience, sir, how many
3 bureaus are normally represented in a crisis working group?

4 A. I would say usually in a crisis working group you have a --
5 a single geographic bureau because most events take place in one
6 geographic area, and then you have the Bureau of Public Affairs
7 because they are large press inquiries. You have the Bureau of
8 Consulate Affairs, which handles our assistants to American citizens
9 in distress. Overseas, you could have the Bureau of Diplomatic
10 Security. You could have the Bureau of Administration, which would
11 be providing logistics. And then you could have, potentially, the
12 Bureau of Human Resources if there are a large number of State
13 Department people involved. So you would say five or six.

14 Q. And, so, sir, how was the WikiLeaks working group different
15 than other crisis working groups?

16 A. It was different in that it -- it impacted every single one
17 of our -- of our six regional bureaus, plus the Bureau of
18 International Organizational Affairs, plus a significant number of
19 the functional bureaus; economic and business, ocean, environment,
20 science, counterterrorism.

21 Q. And, sir, in your 40 years with the Department, have you
22 ever seen a crisis working group that encompassed so many bureaus?

23 A. Never.

1 Q. And why not, sir?

2 A. Because we've never had a crisis that was so -- it's so
3 wide-ranging that affected that many bureaus at -- at one time.

4 Q. Sir, can you please describe for the court the overall
5 mission of WikiLeaks working group within the first 24 to 48 hours?

6 A. The mission of the WikiLeaks working group was to be in
7 communication with the ambassador and chief of mission at our
8 overseas posts and with the assistant secretaries, deputies,
9 assistant secretaries, and office directors within the domestic
10 offices to review the material that we believed could become the --
11 be compromised in such release and determine what -- what
12 recommendations we need to make to the Secretary and what action the
13 State Department needed to take should that information result in a
14 purported leak of State Department documents.

15 Q. Sir, was anyone at the Department looking at the purported
16 documents that were being released in the press?

17 A. Yes.

18 Q. And can you describe that process?

19 A. The documents were being -- we were looking at the
20 purported leaked documents in the press and then -- and then
21 determining what -- what actions we needed to take in light of
22 engaging with -- with foreign officials, either governmental or
23 private, either in Washington or overseas.

1 TC[MAJ FEIN]: One moment, please, sir.

2 [Pause]

3 Q. Sir, how many countries does the United States have
4 diplomatic relations with, approximately?

5 A. I think we have a diplomatic relations with approximately
6 170 countries.

7 Q. And do we have embassies or posts in all of them?

8 A. We have -- we have embassies in about 160 of them. There
9 are some small, smaller nations in a geographic sense, in -- in
10 mainly island nations in the Caribbean and in the Pacific where we
11 have diplomatic relations and our diplomacy relations are carried out
12 by an ambassador resident in another country who is also accredited,
13 meaning also the United States ambassador to one or more of those
14 nations as well.

15 Q. And, sir, how many geographic bureaus are there at the
16 State?

17 A. There are six geographic bureaus.

18 Q. And approximately how many functional bureaus?

19 A. About two dozen.

20 Q. In total, sir, how many of these embassies or the bureaus
21 back at main State were involved in responding to the crisis?

22 A. Every -- every regional bureau, plus the Bureau of
23 International Organizational Affairs, plus probably 20 others.

1 Q. And what about the embassies abroad, sir.

2 A. Every single embassy as well as -- and our consulates as
3 well. Because if our consulates general -- consulates missions to
4 international organizations -- a U.S. intersection, any and all of
5 those offices could have done some element of political, economic
6 reporting and analysis. And so each one of these would have been
7 involved if they had filed reporting cables, and also all of them do
8 to some degree or another.

9 Q. And, sir, when speaking about the embassies, who at the
10 embassies were involved in reviewing these documents and getting back
11 to main State?

12 A. I would say everyone at the embassy, you know, the
13 ambassador, the deputy chief of mission would be leading the team,
14 but you would -- you would have political reporting. You would have
15 economic reporting. You could have science reporting. You could
16 have political military affairs reporting. You could have press and
17 cultural reporting. You could have consulate reporting. You could
18 even have administrative and security reporting. And so every --
19 every officer at that -- at that embassy or other post would have
20 been reviewing that database I mentioned earlier, which we had set
21 up.

22 Q. So, sir, I'm sorry. When you said everyone, you mean all
23 the reporting officers, not literally everyone at an embassy?

1 A. I would think, also, that it would involve the -- the --
2 the consular officers would be also looking at it. There would be,
3 also, the management officer and the security officer would be
4 looking at to see if their -- if any of that reporting, should it --
5 should it be compromised, would have some kind of potentially
6 deleterious effect on either the security or the operation. So, it -
7 - yes, the reporting officers and the ambassador and the deputy chief
8 submission are the first line, but everyone else there is supporting
9 them.

10 Q. Sir, understanding that each post, you already essentially
11 testified, ranges in some sizes; some have ambassadors, some don't,
12 how many total people oversees -- employees of the Department would
13 you say were involved in the initial response to the disclosures --
14 approximately, sir, overseas?

15 A. I would say -- I would say the number is in the thousands.
16 We have about 10,000 American State Department personnel abroad. And
17 I would say a significant number of them would have been involved in
18 this one way or another.

19 Q. And, sir, how many -- on average, how many individuals are
20 assigned to geographic bureaus?

21 A. Geographically vary in size, but I would say that there are
22 several hundred in each -- in each geographic -- each of the six

23

1 geographic bureaus, plus another 150 or so of the Bureau of
2 International Organization Affairs.

3 Q. And, sir, in your estimate, what was the total number of
4 individuals assigned to geographic bureaus that were dedicated to
5 supporting the WikiLeaks working group in the first few weeks after
6 the disclosure started?

7 A. I would say that if you had -- if you had a bureau, it
8 would probably have been 75 or 80 percent of the individuals, only
9 excluding those people who are responsible for the internal
10 administrative processing of the bureau, because if you have a large
11 desk -- a desk is a concept, not a physical thing -- a desk -- a
12 French desk, the Brazilian desk, if that desk has more than one
13 officer on it, that's because there's a large amount of material
14 moving back and forth and, therefore, everyone had been involved. If
15 you had a very small country there might be one officer who is
16 handling two countries. But all of them would have been involved
17 reviewing that potentially leaked material, and then determining what
18 actions needed to be briefed up and what actions might have to be
19 taken bilaterally, multi-laterally.

20 Q. Sir, what about the function of bureaus? How many people,
21 on average, are assigned to those?

22 A. Again, probably 200 -- probably 200.

1 Q. And in your estimate, sir, what was the total number of
2 individuals assigned to functional bureaus that were consumed by the
3 first few weeks of WikiLeaks working group?

4 A. I would say of the 200, probable -- I'm guessing probably
5 more -- more like half because they're -- their responsibilities,
6 though equally important, would probably have been less directly --
7 although some, such as the economic and business bureau or the
8 counterterrorism bureau, might have -- might have been -- might have
9 been up in the 75 to 80 percent range as well.

10 Q. Sir, what about the Under Secretary level? How many Under
11 Secretaries were involved?

12 A. All -- all six Under Secretaries were involved.

13 Q. And what about the Secretary of State? Was she presently
14 involved in the responses?

15 A. She was.

16 Q. And why did Secretary Clinton have to be personally
17 involved in this crisis management?

18 A. Because the Secretary of State is -- (A) Is responsible for
19 the operations of the entire State Department and this was a very,
20 very serious crisis. Secondly, it is the Secretary of State who is
21 either on the telephone with or engaged in meeting or in travels with
22 a huge panoply of senior foreign officials as well as both
23 governmental and non-governmental. And so these are individuals --

1 the individuals she would be dealing with would be -- would be
2 reading -- would be reading the newspaper.

3 Q. Sir, why did you wait essentially at the Department until
4 the release was imminent to start implementing a department-wide
5 response?

6 A. I think there are two reasons for that. The first of all
7 is the Department is always resourced constrained. We put our
8 resources to the -- to the immediate activities and the -- as well as
9 long-term planning that -- that best supports our national security
10 mission, and we took, I believe, prudent preliminary steps such as
11 assembling that -- that intranet database and advising our -- our
12 posts overseas as well as in our offices in Washington to prepare
13 themselves by reviewing the material, but to pull resources off the
14 line to -- to engage in this when we were not absolutely fully sure
15 that the material would be -- would be released would be a potential
16 waste of resources. And the second item is that if we're going to
17 have to deal with a country that is aggrieved about material that
18 they had read, you want to make sure that they had read it before you
19 went to them. Otherwise, you would be ahead -- ahead of the curve.
20 And this is one case where you do not want to be ahead of the curve.
21 Q. Sir, did you direct an impact review to capture the
22 Department's efforts that impacted from the compromise of the
23 compromised of the purported cables?

1 A. I did.

2 Q. And when did you finalize that impact review, sir?

3 A. I did not finalize that impact.

4 Q. Why did you not, sir?

5 A. I received a -- a -- a -- the draft -- the draft that came
6 to me as a -- as a -- as a senior official in August of 2011. And as
7 we were reviewing it, it -- we also very shortly thereafter became
8 aware that there was going to be a second major tranche of purported
9 documents moving into the -- into the press. And it became evident
10 from looking at that and looking at the material that had been
11 prepared, what I had in my hand was a snapshot based upon earlier
12 material which was certainly not comprehensive when you took the
13 material that was -- was published -- the purported State Department
14 documents, and then added to it the second major tranche that was
15 about to be released, which in that second tranche was purported to
16 contain a large number -- a larger percentage of classified material
17 than the first tranche and, therefore, what I had was a snapshot in
18 time, and certainly by no means represented a full and conclusive
19 damage assessment.

20 Q. Sir, would a -- a completed assessment have mitigated any
21 potential damage?

22 A. No.

23 Q. Why not, sir?

1 A. Because an assessment is simply measuring -- measuring --
2 measuring damage. It does not mitigate damage.

3 Q. Sir, from what you observed in your position as the Under
4 Secretary of State for Management, has the department's ability to
5 conduct diplomacy been impacted by the PFC Manning's actions?

6 A. Yes.

7 Q. And has that also impacted foreign relations?

8 A. Yes.

9 Q. Sir, why is the ability to conduct diplomacy important to
10 the United States' national interests?

11 A. I believe that there is a -- is a three-legged -- three-
12 legged stool that -- that protects U.S. national security. There's
13 obviously our military, our development assistance which helps
14 countries develop so that they do not become -- become ungovernable
15 states and potential havens for terrorism, and, also, the
16 humanitarian point, which is equally valid of helping people in
17 desperate need, and the third -- the third leg of that stool is
18 diplomacy. And to do -- to underpin the national security, you need
19 a robust State Department diplomatic effort, which includes the
20 ability to report and analyze events that are going on across the
21 world so that that will become a piece of the puzzle, i.e.,
22 information that is available to national security decision makers in
23 Washington. And if we are not able to engage in full and frank and

1 private and confidential discussions with a full range of foreign
2 interlocutors, we are not -- we do not -- we are not able to craft up
3 the reporting and analysis to feed to those national security
4 decision makers in Washington -- information of a quality that is
5 diminished otherwise.

6 Q. Sir ----

7 CDC[MR COOMBS]: Excuse me, Major Fein ----

8 MJ: Yes.

9 CDC[MR COOMBS]: ---- I -- just the last part, again,
10 1001(b)(4), Your Honor.

11 MJ: All right. Got it.

12 **Questions continued by the trial counsel [MAJ FEIN]:**

13 Q. So, sir, specifically in reference to the private and
14 confidence and the trust our foreign interlocutors have to have of
15 us, don't the -- well, do the foreign interlocutors still have to
16 work with us even if they didn't have the trust and confidence in us?

17 A. Obviously, they have to work with us. And when -- when we
18 go into a foreign embassy to deliver a demarche, which means a
19 request that the United States is making them to engage in some kind
20 of action or support for the United States in some world forum, they
21 will certainly receive our demarches, they will certainly potentially
22 work with us if it is in their national interest, and many cases it
23 would be in their -- in our common interest to do so. But what we

1 would be lacking is a full and frank exchange of views on what their
2 thinking is, what their analysis is of a situation that is developing
3 or could develop. And it's that exchange, that full and frank
4 exchange that allows us to craft the best analytical reporting to
5 Washington on circum -- on circumstances. And, so, yes, they will
6 continue to work with us. But it's the -- the full and frank
7 discussion that leads to the best analytical product.

8 MJ: Yes [speaking to the defense]?

9 CDC[MR COOMBS]: Just that last part again of his answer,
10 Your Honor; 1001(b)(4).

11 MJ: Got it.

12 Q. Sir, can you please describe for the Court how
13 conversations between diplomats and foreign partners are reported
14 back to Washington?

15 A. Yes. We have a system and it has -- it's one of those sort
16 of historical names. They're sometimes called cables. They're
17 sometimes called telegrams. They are neither. They're automated
18 word processing transmissions, but it's -- they're called cables or
19 telegrams, and you see that often referred to. What happens is we
20 have officers stationed at our posts around the world whose
21 responsibility is political reporting and analysis, economic
22 reporting and analysis, cultural and press, science, political
23 military, et cetera, consular, even -- even managerial reporting and

1 analysis. That -- officers at our embassy monitor the situations
2 that is ongoing in the nation to which they are assigned, or
3 potentially in adjacent nations as well. Look at that, analyze it in
4 the context of their own expertise. I mean, these are individuals
5 who have been trained in the language and culture of that country,
6 and they rise in the ranks probably subsequent and repetitive tours
7 in a country or region. So these are our subject matter experts.
8 But that's not enough. What they do then is they go out and they
9 meet and they talk with -- with representatives of that government --
10 of other governments who happen to be based in that same location of
11 -- of journalists, educators, non-governmental organizations, the
12 business community. They meet and discuss issues with all of those
13 people, engage in the full frank discussions, and then go back to the
14 embassy and craft a cable, a telegram, a report, that says, in
15 effect, here is what is going on. And then they report on the why
16 and then on -- and then, depending upon the circumstances,
17 predictions, so to speak, about what actions might be taken in the
18 future by that nation. And then that reporting and analysis feeds
19 into the national security analysis in Washington.

20 Q. So, sir, how do you, as the Under Secretary for Management,
21 oversee this process?

22 A. It is -- I provide the physical plant overseas. I provide
23 the personnel. I provide the security, the medical, the logistics,

1 and I also provide the records management in Washington, and I
2 provide the information technology transmission, so to speak, between
3 the posts and Washington so that those reports do reach Washington
4 and other U.S. government agencies, and also if -- an embassy could
5 also be reporting what we call laterally, meaning the embassy in
6 Shangdu is not only sending the report to Washington, but is also
7 sending the report to the embassy in Shangri-La, which is a country
8 which might have some interest in this meeting -- our embassy in that
9 country has interest in that reporting.

10 Q. Sir, why does the Department write cables or telegrams?

11 A. To -- to inform the policymakers in Washington so that they
12 can develop the best national security position for the United
13 States.

14 Q. And, sir, who within the U.S. government reads these
15 cables?

16 A. The State Department reporting analysis goes to -- I think
17 probably any U.S. government agency that has an interest in
18 international affairs or has an interest in domestic affairs that is
19 impacted by activities that go on overseas.

20 Q. And, sir, about how many cables, on average, are sent from
21 any given embassy on any given day?

22 A. It -- it can range from, you know, from a half dozen at a
23 small embassy to -- to -- 100 or more in a large embassy.

1 Q. Sir, prior to Private First Class Manning's actions was
2 information about sources included in cables?

3 A. We -- we almost always cited the -- our interlocutors. I
4 would not refer them -- to them as sources.

5 Q. Okay.

6 A. Sources has -- has another -- has another context. But we
7 don't -- we refer them as -- just as the people we -- we meet with.

8 Q. And, sir, what purpose is it -- what purpose is served when
9 you list the individuals -- the people that our diplomats meet with -
10 - in general, sir?

11 A. It's a very important element in giving context and
12 credibility to the -- to the reporting information. A report from a
13 more senior government official might, in given circumstances, carry
14 more weight than a report than a junior -- junior official. A report
15 of a discussion with a senior member of the -- of an opposition party
16 in a country conveys a -- a certain context to Washington. A report
17 from a senior management of the business community would be very,
18 very important potentially to the -- to the export/import bank -- or
19 the overseas private investment corporation in determining their --
20 their strategy to promote United States economic investments or U.S.
21 exports.

22 Q. Sir, is the information the Department of State reports on
23 inform U.S. government policy?

1 A. Yes. Policymakers in Washington do not operate in a
2 vacuum. There are obviously views from -- from multiple government
3 agencies. The State Department has views. The Defense Department
4 has views. The Department of Commerce might have views. All U.S.
5 government agencies tend to have views on -- on events overseas that
6 impact on -- on the United States' national security. What that
7 reporting and analysis feeds context in, allows policymakers to make
8 the best decisions because they are -- that -- their decision making
9 is informed from the widest possible ambit.

10 Q. And, sir, after PFC Manning's compromise of the purported
11 cables, was there change in the type of source information -- excuse
12 me, person -- person's information -- the people that the drafters
13 included in cables?

14 A. Some -- some -- some embassies have changed that. That is
15 -- that is -- that is -- that is deleterious and we have -- we think
16 we're losing something in that regard. Not every embassy has,
17 however.

18 Q. Okay, sir.

19 CDC[MR COOMBS]: And, Your Honor, I'd ob -- 1001(b) (4) on
20 that answer.

21 MJ: I have it. Thank you.

22 Q. So, sir, did you correct that change or is that change or
23 is that ----

1 A. No.

2 Q. ---- embassy specific?

3 A. Self-generated at various embassies.

4 Q. Yes, sir. And, sir, why did the Department of State
5 provide other agencies, as you've already testified about, access to
6 the diplomatic reporting?

7 A. The State Department is represented in 280-some odd posts
8 around the world. We have the widest geographically dispersed
9 representation of any U.S. government agency, period. And that means
10 that our -- our personnel are doing reporting and analysis from more
11 locations with more -- with more personnel than any other U.S.
12 government agency. And, therefore, these other U.S. government
13 agencies want the widest possible range of reporting to -- if nothing
14 more to interleave or compare and contrast with other reporting that
15 they may be receiving from -- from -- from other -- from other U.S.
16 government agencies. So these agencies need our reporting and
17 analysis in order to inform their part of the -- of the national
18 security including economic security and national security.

19 Q. Sir, I have a few more questions for you. Sir, this is
20 just a yes or no question, but do you have an opinion on whether
21 these disclosures impacted the Department of State?

22 A. Yes.

23 Q. And, sir, how confident are you in that opinion?

1 A. Totally confident.

2 Q. Sir, what is your opinion on whether these disclosures
3 impacted the Department of State?

4 A. These in -- these disclosures had a chilling effect on
5 foreign officials, governmental and non-governmentals willingness to
6 engage in full and frank discussions with us, which is detrimental to
7 us assisting in our responsibilities to protect the national
8 security.

9 CDC[MR COOMBS]: And, Your Honor, 1001(b)(4) and speculative.

10 MJ: I have it.

11 Q. Sir, again, a yes or no question. Do you have an opinion
12 on whether these disclosures will continue to impact the Department
13 of State?

14 A. Yes.

15 Q. And, sir, how confident are you on that opinion?

16 A. Totally confident.

17 Q. Sir, what is your opinion on whether these disclosures will
18 continue to impact the Department of State?

19 A. We have had -- we have had situations in which individuals
20 who have, for example ----

21 Q. Sir, I'm sorry I have to interrupt you, sir. Without
22 giving examples, sir, if you could just explain why you believe these
23 disclosures will continue to impact the Department of State.

1 A. Certainly. The underpinning of diplomatic reporting and
2 analysis is full and frank discussion with -- with -- with foreign
3 officials. I believe those foreign officials feel that in many cases
4 that they do not have the ability to engage in that same level of
5 full and frank conversation because -- because of what has happened
6 and, therefore, that is a chilling effect that will go on for some
7 time. People -- people have long memories.

8 CDC[MR COOMBS]: Your Honor, again, 1001(b)(4), speculative.

9 MJ: All right.

10 Q. And, sir, a yes or no question; do you have an opinion,
11 sir, on whether these disclosures impacted policymakers who rely on
12 diplomatic reporting?

13 A. Yes.

14 Q. And, sir, how confident are you in that opinion?

15 A. Totally confident.

16 Q. And, sir, what is your opinion on whether the disclosures
17 impacted policymakers that relied on diplomatic reporting?

18 CDC[MR COOMBS]: Your Honor, I have an objection here,
19 speculation and foundation for the opinion.

20 MJ: Foundation is one of the objections?

21 CDC[MR COOMBS]: Yes, Your Honor.

22 MJ: All right. Proceed. You can develop your foundation -- if
23 -- should you have any additional foundation you want to add.

1 TC[MAJ FEIN]: One moment, please, ma'am.

2 [Pause]

3 TC[MAJ FEIN]: Ma'am, the United States believes that it has
4 laid a proper foundation for that opinion.

5 MJ: That's fine. Proceed.

6 **Questions continued by the trial counsel [MAJ FEIN]:**

7 Q. So, sir, to reask the question, sir, what is your opinion
8 on whether these disclosures impacted policymakers that relied on
9 diplomatic reporting?

10 A. Policymakers, in order to develop the best course of action
11 for the U.S. national security, need the best possible reporting and
12 analysis from the State Department as its contribution. And absent a
13 full and frank discussion, which I believe has been chilled, they --
14 they then do not get the best possible reporting and analysis that
15 would enable them to do potentially a better job in -- in supporting
16 our national security.

17 TC[MAJ FEIN]: Thank you, sir. Your Honor, there are no further
18 questions.

19 MJ: Okay. Defense, do you want a recess before you go?

20 CDC[MR COOMBS]: Yes, Your Honor. If we could have -- come
21 back maybe 25 after.

22 MJ: All right. Ambassador Kennedy, please don't discuss your
23 testimony or knowledge of the case with anyone other than counsel or

1 the accused while -- well, actually don't discuss your testimony with
2 anybody during the recess.

3 WIT: Yes, Your Honor.

4 MJ: And, I'm sorry, how long did you need?

5 CDC[MR COOMBS]: Just until 25 after, Your Honor.

6 MJ: All right. Court is in recess until 25 after 11.

7 **[The court-martial recessed at 1113, 5 August 2013.]**

8 **[The court-martial was called to order at 1126, 5 August 2013.]**

9 MJ: The court is called to order. Let the record reflect all
10 parties present when the Court last recessed are again present in
11 court. The witness is on the witness chair. Proceed, Mr. Coombs.

12 CDC[MR COOMBS]: Thank you, Your Honor.

13 **CROSS-EXAMINATION**

14 **Questions by the civilian defense counsel [MR. COOMBS]:**

15 Q. Under Secretary Kennedy, I remind you you're still under
16 oath.

17 A. Yes, sir.

18 Q. Okay. I want to start off by asking you a few questions
19 about the use of cables with the Department of State, okay?

20 A. [No response]

21 Q. The State Department has historically accomplished the
22 basic communication between Washington and its overseas posts through
23 the use of diplomatic cables?

1 A. Yes.

2 Q. And you would agree that United States policy formulation
3 is done at the State Department in Washington and across inter-
4 agencies?

5 A. With input from the diplomatic reporting as well as other
6 input from other agencies.

7 Q. Correct, but the actual formulation of the policy is done
8 here in Washington with inter-agencies, correct?

9 A. With input from -- from diplomatic reporting.

10 Q. All right. And the diplomatic cables that you receive --
11 the input, that's not policy, though?

12 A. [No response]

13 Q. It's not a statement of policy, is it?

14 A. No.

15 Q. And diplomatic cables are not always accurate?

16 A. Diplomatic cables report the facts as they are then known
17 to the -- to the individuals who are doing the reporting.

18 Q. But my question is diplomatic cables are not always
19 accurate?

20 A. I'm afraid I can't give you a yes or no answer to that. To
21 say -- to say, yes, they're not always accurate, implies that there
22 is a deliberate inaccuracy in the reporting when the report is filed.
23 Facts on the ground can change and so an accurate reporting in 2002

1 may no longer be the case in 2003, but that, in my opinion, does not
2 make the report of 2002 inaccurate, it just means the situation has
3 been overtaken by events between 2002 and 2003.

4 Q. Let me then -- I think based upon what you answered there,
5 I'll take out the deliberate aspect, because that's not my question,
6 so not a deliberate inaccuracy within a diplomatic cable, but
7 diplomatic cables are not always accurate. So someone could report
8 something they believe to be true and immediately we'd find out it is
9 not true, is that correct?

10 A. That is possible, yes.

11 Q. Now, a diplomatic cable is a report of information or facts
12 from a particular ambassador or post, correct?

13 A. It's -- it's a report from -- from the post, yes.

14 Q. And that is -- that cable is the view from that particular
15 post of the facts?

16 A. Yes.

17 Q. So that's the view from their vantage point, what they
18 believe might be the facts on the ground where they're reporting
19 from?

20 A. Yes.

21 Q. And each diplomatic cable that comes in will have the
22 ambassador's name on the bottom?

23 A. That is a convention, yes.

1 Q. And because it's a convention that means -- that doesn't
2 many that the ambassador actually drafted that cable, right?

3 A. That is correct.

4 Q. If it dealt with routine administrative matters, the
5 ambassador might not even -- even review the cable?

6 A. Correct.

7 Q. And depending upon the size of the embassy or post, and the
8 number of cables going out, an ambassador might not even review a
9 cable that has his or her name on it?

10 A. Well, ambassador -- the ambassador's name is on every cable
11 that goes out if he or she is present at the post. But -- if your
12 point -- but -- yes, an ambassador does not -- does not physically
13 necessarily read every cable that goes out of a post even though it
14 bears his or her signature.

15 Q. And the SIPDIS cables; those were addressed -- when they
16 have the ambassador's name on the bottom, they were addressed to the
17 Secretary of State, correct?

18 A. All cables inbound from Washington, as well all cables
19 outbound from Washington, say either to or from SECSTATE.

20 Q. And, obviously, that doesn't mean that the Secretary of
21 State reads all of these cables?

22 A. That is correct.

23 Q. And as you were -- just said, the -- the outbound cables

1 also have the Secretary of State's name on them?

2 A. Correct.

3 Q. And that clearly does not mean that the Secretary of State

4 wrote those reports -- those cables, correct?

5 A. Correct.

6 Q. Read the cable?

7 A. All -- not necessarily.

8 Q. Or even was aware that the cable went out?

9 A. Depending upon the subject matter, yes.

10 Q. And that's -- as you had earlier testified, that's just

11 kind of a coming convention that's a holdover of, I guess, years gone

12 by?

13 A. It's a convention, yes.

14 Q. Now, the Net-Centric diplomacy database, that was available

15 to anyone who has SIPRNet access at one point, correct?

16 A. Correct.

17 Q. And those cables that were shared on the NCD database, they

18 were all captioned with the distribution caption of SIPDIS?

19 A. Correct.

20 Q. And within the State Department, the access to and control

21 over the cables and who it's distributed to is controlled by the use

22 of tags, which I'm not going to really talk about, but then also

23 captions, correct?

1 A. And a third element.

2 Q. And -- go ahead.

3 A. It's called AMADs. And I'm not sure what the acronym
4 stands for, but it is, in effect, an artificial intelligence that
5 reads the cables -- and depending upon keywords that it finds in the
6 message. So that would be captions, tags, and AMADs would be the
7 distro -- would formulate the distribution pattern.

8 Q. And SIPDIS would be an example of one of the distribution
9 captions that you would use?

10 A. Yes.

11 Q. And with regards to the Department of State, the advice and
12 training that was put out to the various embassies and posts was that
13 SIPDIS caption meant that it was appropriate to share with our inter-
14 agency partners, is that correct?

15 A. Yes.

16 Q. Now, there are, obviously, other more sensitive captions
17 that can be used for cables?

18 A. There are -- there are lots of captions available for use.
19 Some of them are directional. Some of them -- some of them are
20 restrictive, yes.

21 Q. And some of the captions that would restrict the audience -
22 - narrow the audience who could actually review them -- I'm just
23 going to name a few, and tell me if you're aware of these or are

1 familiar with them. STATDIS or STADIS?

2 A. STADIS, yes.

3 Q. Okay. NODIS?

4 A. Yes.

5 Q. EXDIS?

6 A. Yes.

7 Q. ROGER?

8 A. Yes.

9 Q. TERREP?

10 A. Yes.

11 CDC[MR COOMBS]: Okay. Now, I'm showing you -- I'll show you
12 what's been marked as Defense Charlie-Charlie-Charlie for
13 identification. It is a portion of the Foreign Affairs Handbook.

14 Q. Are you familiar with the Foreign Affairs Handbook?

15 A. Yes.

16 CDC[MR COOMBS]: And I hand the witness Exhibit Charlie-
17 Charlie for identification or -- excuse me, Charlie-Charlie-Charlie
18 [handing the document to the witness].

19 Q. Do you recognize that?

20 A. [Looking at the document] I recognize -- I recognize the
21 format, and I'm going to assume that you've given me an accurate
22 copy.

23 Q. And the Foreign Affairs Handbook has several sections to

1 it, correct?

2 A. There are -- there are multiple volumes of the Foreign
3 Affairs Handbook.

4 Q. And the volume or the section that you have in front of
5 you, does that deal with just captions -- what captions mean?

6 A. Chapter -- Volume 5 deals with -- with information
7 technology and telecommunications, and the subsection you have is
8 labeled "Captions and Handling Instructions", yes.

9 Q. If you would, please, Under Secretary, just kind of thumb
10 through that for a moment and tell me whether or not that kind
11 discusses each of the possible captions that you can have for a
12 cable?

13 A. [The witness did as directed] Okay. It seems to -- it
14 seems to -- it has -- it has lots of captions that I recognize.

15 Q. And underneath each of those captions it also gives
16 comprehensive instructions about when you would use that caption, is
17 that correct?

18 A. Yes.

19 CDC[MR COOMBS]: I'm retrieving from the witness Defense Exhibit
20 Charlie-Charlie-Charlie for identification [retrieving the document
21 from the witness] and offering into evidence as Defense Exhibit
22 Charlie-Charlie-Charlie.

23 MJ: Any objection?

1 TC[MAJ FEIN]: Lack of foundation, Your Honor.

2 MJ: What's missing?

3 TC[MAJ FEIN]: Well, ma'am, Under Secretary Kennedy didn't
4 specifically remember that being -- there's -- that being the actual
5 Foreign Affairs Handbook -- where it came from. He kept saying it
6 appears to be this.

7 MJ: Well, why don't we do this; I'm not going to initial off on
8 it now. If -- what I will do is provisionally admit it. If you can
9 find something that can show me that it's an accurate version of the
10 Foreign Affairs, I will admit it.

11 CDC[MR COOMBS]: Okay, your Honor.

12 MJ: But consider it provisionally admitted for now.

13 CDC[MR COOMBS]: I'm retrieving that from the Court [retrieving
14 the document from the Military Judge]. Just to lay the foundation,
15 I'm handing Defense Exhibit Charlie-Charlie-Charlie for
16 identification to the witness [handing the document to the witness].

17 Q. Is there anything on the very top of that or bottom of that
18 document that would indicate to you that this is from the Department
19 of State?

20 A. [Looking at the document] As I said earlier, the formatting
21 and everything looks like -- looks like a -- pages from the Foreign
22 Affairs handbook. I just ----

23 MJ: Do you have any reason to question its accuracy?

1 WIT: No, but I -- as I said, depending upon the questions that
2 follow, I cannot -- I cannot, Your Honor, state that -- with 100
3 percent certainty that this is an accurate copy of this chapter of 5
4 -- Manual 5 Foreign Affairs Handbook. I don't know that it's not,
5 but I don't know that is. And I'm -- so I'm not willing to say -- to
6 certify that this -- if I was presented as the Under Secretary for
7 Management, I would give it to staff and say -- if I was submitting
8 this to a court of law, I would go have it validated that I would --
9 that this is the copy that was being submitted was going in was
10 absolutely correct. I have no reason not to believe it is, Your
11 Honor, but I just don't have any reason to know it is either.

12 MJ: I understand that. May I see it for just a moment?

13 WIT: Certainly [handing the document to the Military Judge].

14 MJ: Here's what we're going to do; I'm going to admit it.
15 Government, if you think there's something that's not accurate about
16 this document, you're certainly free to advise the Court and the
17 Court will take action accordingly.

18 TC[MAJ FEIN]: Yes, ma'am.

19 MJ: All right, Defense Exhibit Charlie-Charlie-Charlie for
20 identification is admitted.

21 Q. And, Ambassador Kennedy, I'm going to ask you a few
22 questions about various caption -- excuse me, Under Secretary
23 Kennedy, I'm going to ask you a few questions about various captions.

1 I wanted you to have the benefit of that if you needed to look at
2 something to refresh your memory.

3 A. Certainly.

4 Q. Otherwise, your memory is perfectly fine. With regards to
5 STADIS; STADIS is used basically to preclude initial distribution to
6 other federal agencies, is that correct?

7 A. That's correct.

8 Q. STADIS is basically for the internal deliberative process
9 for the State Department?

10 A. No, I think -- I think it -- it goes beyond that. It could
11 be that, it can be other things. It's simply a caption to ensure
12 that the distribution remains State Department only. It could be
13 deliberate, it could be administrative, it could be -- it could be
14 any purpose in which the originator wishes this material to remain
15 only within the State Department.

16 Q. And -- and basically by the use of that caption that is
17 when, for whatever reason, it would be either premature or just
18 simply not the type of information that you would want to share with
19 interagency partners?

20 A. Again, there could be a huge range of subjects. I mean,
21 the -- the salient item is that the originator says that he or she
22 wishes this to be handled only within State Department distribution
23 channels and no one else.

1 Q. Now, with regards to NODIS, that caption identifies
2 messages of the highest sensitivity basically between the President,
3 the Secretary of State and chiefs of mission, is that correct?
4 A. Correct.
5 Q. And not with like fact, but can you provide us with kind of
6 an example of what would be a NODIS?
7 A. I would say if you -- if -- if an ambassador in a country
8 wished to provide information of the highest sensitivity, let us say
9 on ongoing negotiations about conflict raging between Shangdu and
10 Shangri-La and, because of the nature of the information, we were
11 restricting that to only certain -- a very, very limited number of
12 people.
13 Q. And in with regards to the EXDIS caption, that is used for
14 highly sensitive traffic between the White House, the Secretary, the
15 Deputy Secretary and the Under Secretaries of State?
16 A. It has -- it has -- it has a variety -- a wide variety of
17 uses, but it is very close to what you said.
18 Q. And can you provide us with just kind of a general example,
19 again, of what type of cable might be an EXDIS cable?
20 A. Again, it would -- it depends upon the circumstances. And
21 I would say probably you would find some arms control negotiations
22 material potentially -- potentially in that channel.
23

1 Q. And then with regards to ROGER, that's for communications
2 between the assistant secretary for intelligence and research; I&R,
3 and the chiefs of mission, is that correct?

4 A. That is an administrative channel. That is not a reporting
5 channel.

6 Q. With a cable, though, that's labeled as a ROGER, can you
7 give us an example of what type of cable?

8 A. No, not in this -- not in this -- not in this session.

9 Q. Okay. And TERREP; that's a caption used for messages
10 related to information about terrorism, is that correct?

11 A. That is -- that is the channel used to call attention to
12 terrorist reporting, yes.

13 Q. And these are messages, my understanding, that can only be
14 distributed to members of the emergency action committee, is that
15 correct?

16 A. I would have to refresh my memory on that.

17 Q. And are you -- again, in a very general unclassified
18 format, can you give an example of what a TERREP type cable might be?

19 A. A TERREP cable would be a report of a potential terrorist
20 attack.

21 Q. Now, the SIPDIS caption, as we said, that is a caption that
22 is only used if it can be shared with the interagency partners?

23 A. No.

1 Q. Okay. Can you go ahead and enlighten me?

2 A. The State Department shares large numbers of cables with
3 the interagency partners and this -- to answer the question, Your
4 Honor, I have to go back to a little history, if I might.

5 MJ: That's fine.

6 A. The Department of Defense came to the State Department mid
7 -- mid-2000s or so and said that because of the importance of State
8 Department reporting to it and because of the size of the defense
9 department, the current -- current kind of pull -- push system in
10 which the State Department would dispatch cables to SECDEF; Secretary
11 of Defense, OSD, JCS; Joint Chiefs of Staff, Fort Richardson -- did
12 not necessarily -- because of the size of DoD, that's -- they would
13 not necessarily get to potentially the right elements within the
14 Department of Defense and, therefore, ask that a database be set up
15 in which the State Department would push reporting to that database
16 and then the DoD would be able to pull information from that database
17 based upon the needs of the individual puller.

18 Q. Now, with regards to the Defense Exhibit Charlie-Charlie-
19 Charlie, it lays out guidance for when you would use the SIPDIS
20 caption, correct?

21 A. There are instructions there, yes.
22
23

1 Q. And, again, that -- that -- those instructions indicate for
2 information messages deemed appropriate for release to the U.S.
3 government interagency community?

4 A. Correct.

5 Q. And a SIPDIS caption message is never to be combined with
6 more restrictive captions such as NODIS, EXDIS, ROGER or TERREP?

7 A. Correct.

8 Q. If a message carries conflicting captions, the more
9 restrictive caption is going to govern it?

10 A. Correct.

11 Q. So a SIPDIS caption, for instance, if it does have more
12 restrictive caption with it, it's not going to go into the Net-
13 Centric Diplomacy database?

14 A. Correct.

15 Q. Additionally, a SIPDIS caption is not supposed to be used
16 with Privacy Act information?

17 A. That is correct.

18 Q. So your MED channels, your HR channels, DS channels, DSX
19 channel, that stuff will not be in a SIPDIS cable?

20 A. That is correct.

21 Q. Again, if you had a SIPDIS cable that had this type of
22 information, again, it would not be loaded into the Net-Centric
23 Diplomacy database?

1 A. Yes. Well, if it had the other caption on it ----
2 Q. Correct.
3 A. ---- it would cause it -- it would cause it, if the machine
4 is working correctly, to what's called spill, meaning spill to man --
5 to manual management upon arrival at its destination.
6 Q. And drafting officers were directed, basically, to use the
7 SIPDIS caption only for those messages that fit the requirements of
8 SIPDIS?
9 A. Correct.
10 Q. And so they understood that these were messages that were
11 designed to be shared with out interagency partners?
12 A. Correct.
13 Q. And during the period from 2005 to 2010, the State
14 Department had posted some 250,000 or so cables to the Net-Centric
15 Diplomacy database?
16 A. Correct.
17 Q. And during that same period of time the State Department
18 disseminated approximately 2.4 million cables through other systems
19 to our other -- 65 other government agencies?
20 A. I believe that's -- yes. I recall that figure. I would
21 want to verify it. But it's right within one or two percent either
22 way.
23

1 Q. All right. So I believe you testified at Congress that
2 basically ten times as many cables that were given to -- well,
3 actually, the amount of cables given to the Net-Centric Diplomacy
4 database, during that same time period, ten times that many cables
5 were pushed out to our interagency partners through other means?

6 A. Correct.

7 Q. So, obviously, the majority of the cables that were being
8 shared with interagency partners were not SIPDIS cables?

9 A. That is correct.

10 Q. So the policy formulation and whatnot, that wasn't entirely
11 relied upon by SIPDIS cables, there were other cables going out for
12 policy and formulation?

13 A. That is correct.

14 Q. Do you know -- and you might not, and that's fine if you
15 don't, what percentage of Department of State cables were labeled as
16 SIPDIS cables on any given year?

17 A. No, I don't. I don't have that fact at hand.

18 Q. Was it a -- in a general standpoint, was it a small
19 percentage of the overall cables or a large percentage of the overall
20 cables that were labeled SIPDIS -- or could you guess?

21 A. It would be hard to guess because you would first have to
22 factor out all the administrative or logistical cables that are sent,
23 and then you SIPDIS as a percentage of other reporting cables and --

1 I'm sorry, I don't have that -- that number available to me.

2 Q. That's fine. Now, my understanding is that when it
3 received the SIPDIS caption, those types of cables were automatically
4 by the, basically, automated process put into the Net-Centric
5 Diplomacy database?

6 A. Correct.

7 Q. There wasn't a person that was looking at the cable first
8 and then saying, yeah, that should go into the Net-Centric Diplomacy
9 database?

10 A. Correct.

11 Q. And in 2005 through 2010, if an ambassador or somebody
12 posted a cable that was SIPDIS, they labeled it as SIPDIS, within
13 minutes of them submitting it, it would get put into the Net-Centric
14 Diplomacy database?

15 A. Correct.

16 Q. And after process, basically, and placed in the Net-Centric
17 Diplomacy database, it would be available to anyone who had SIPRNet
18 access?

19 A. Correct.

20 Q. And ambassadors and posts understood that fact?

21 A. Yes.

22

23

1 Q. So is it fair to say that if somebody labeled it as SIPDIS,
2 they knew that it would be accessible to the million or so people who
3 have SIPRNet access?

4 A. I'm not sure that they knew that they were a million or so
5 people who had SIPRNet access, but they thought that it was a -- it
6 was a category to make sure that the Department of Defense had the
7 material available to it just like they would put other -- they would
8 put other tags on -- on the cable as well.

9 Q. And SIPDIS ----

10 A. As I mentioned earlier, there are other -- there are other
11 ways to ensure that messages get to -- get to other users.

12 Q. All right. And with regards to SIPDIS cables; if you label
13 it as SIPDIS, in your opinion, would that state something about the
14 type of information that would be in SIPDIS cables?

15 A. No.

16 Q. And why not?

17 A. Because it was -- its purpose was to -- to get it to that -
18 - to the Net-Centric database so it would be available at the request
19 of DoD more easily for defense department and potentially other --
20 several other U.S. government agencies also have access to SIPRNet,
21 which is the Department of Defense classified database. And the SIP
22 -- the SIP in SIPDIS stands for SIPRNet access.

23

1 Q. And from your perspective -- perspective, did you review
2 SIPRNet or SIPDIS cables, ever?

3 A. I read -- I read cables all day long. I -- I don't ever
4 really particularly look at the captions. I look at the subject
5 lines. And I look at the summary paragraph, and then determine from
6 the subject line and the summary paragraph whether I need then to
7 read the entire -- entire message depending upon what is in the
8 subject line and what is in the summary paragraph.

9 Q. Between 2005 and 2010, were the SIPDIS cables available to
10 you in some other way besides Net-Centric Diplomacy database?

11 A. Yes. Because I'm State Department, they would be available
12 on the -- on the State Department distribution system.

13 Q. And on that system, were they separated at all from any --
14 any cable with a different caption?

15 A. No.

16 Q. All right. Now, when the DoD material ----

17 A. Excuse me.

18 Q. Go ahead.

19 A. Cables like NODIS and ROGER channel are handled in very,
20 very special ways. But in terms of diplomatic -- routine and
21 diplomatic and consular reporting, it could be SIPDIS, it could not
22 be SIPDIS. It would appear on my -- on my computer screen as a
23 telegraphic report from whatever embassy was the originator.

1 Q. When purported material from the State Department was
2 allegedly given to WikiLeaks, the State Department immediately asked
3 the chief of mission at the affected post to review the purported
4 statements -- Department cables, correct?

5 A. Correct.

6 Q. And the State Department also directed the chiefs of
7 mission to provide an assessment as well as a kind overall summary of
8 the effect that the release of the purported cable could have on the
9 host country?

10 A. Correct.

11 Q. In this review, an assessment was completed in August of
12 2010?

13 A. No, the -- no, sir. The -- the request that was completed
14 in August of 2010 -- not completed in August of 2010, is a -- is a --
15 is a damage assessment. It was a damage assessment commissioned, and
16 the damage assessment was -- drew from reports from chiefs of
17 mission, ambassadors, but the damage assessment was never completed.

18 Q. I'm not talking about damage assessment, what I'm talking
19 about is the review that you got from the chiefs of mission at the
20 affected post.

21 A. There were individual submissions from chiefs of mission,
22 yes.

23 Q. And that was completed in August of 2010?

1 A. There was, I guess -- I apologize. I guess I'm hung up on
2 the "it." There were individual chiefs of mission reports, but there
3 is no it -- there is no -- each chief of mission sent in a cable.
4 And so we had the cable from all the chiefs of mission. And I'm --
5 they -- and I'm sure that they were put in a binder, you know,
6 alphabetically by post. If that's the "it," yes.

7 Q. Okay. And to make sure we're talking about the same "it"
8 then, you had testified about the -- about what the Department of
9 State had done in front of the Senate Committee on Homeland Security
10 and Governmental Affairs?

11 A. If you could read the section to me, I'd appreciate it.

12 Q. Well, first, before I do that, you did do that, correct?
13 You testified ----

14 A. I testified before the Senate Committee, yes.

15 Q. And there you testified that we immediately asked the
16 chiefs of mission at affective posts to review any purported State
17 material in the release and provide an assessment as well as a
18 summary of the overall effect of the WikiLeaks release could have on
19 relations with the host country following the completion of this
20 review in August.

21 A. Okay.

22 Q. And so ----

23

1 A. All right. You're talking about August of 2010, not the -
2 - not the August 2011.

3 Q. Yeah, I'm not talking about the damage assessment.

4 A. Okay. Thank you. I just -- if we're talking about 2010, I
5 now understand your question.

6 Q. Okay. So let me go back then. You had the chiefs of
7 mission review the purported State Department material from their
8 area, correct?

9 A. Correct.

10 Q. And you asked them to look at it and to give their
11 impressions on how that might affect relations with the host country?

12 A. Correct.

13 Q. And they got back to you by August of 2010?

14 A. Correct.

15 Q. And when it was believed that the State Department cables
16 might actually be released, you then, again, instructed all of the
17 chiefs of missions to familiarize themselves with the content within
18 the Net-Centric Diplomacy database?

19 A. Correct.

20 Q. And based upon that direction, again, you got feedback from
21 the chiefs of mission?

22 A. Correct.

23

1 Q. And when the press and WikiLeaks announced that -- that
2 there was going to be a release of purported cables on 28 November
3 2010, that's when the State Department took several additional
4 actions?

5 A. Correct.

6 Q. And one of those was to create the 24/7 WikiLeaks working
7 group?

8 A. Correct.

9 Q. And as you had said, this was a working group composed of
10 senior officials from throughout the State Department?

11 A. Correct.

12 Q. To include your regional bureaus?

13 A. Correct.

14 Q. And how long did the 24/7 WikiLeaks working group conduct
15 its work?

16 A. I think it was several months. I -- I don't have the exact
17 end date in mind.

18 Q. And do you have an idea of what month they stopped working?

19 A. No, I don't. I'm sorry.

20 Q. Less than six months?

21 A. Less than six months.

22

23

1 Q. Now, during this period the Department of State kept
2 Congress apprised of its response to any potential release by
3 WikiLeaks, correct?

4 A. Correct.

5 Q. And according to your testimony, the Department convened
6 two separate briefings for members of both the House of
7 Representatives and the Senate within days of December 2010?

8 A. Correct.

9 Q. And members of the Department also appeared twice in front
10 of the House Permanent Select Committee On Intelligence both on 7
11 December and 9 December 2010?

12 A. Correct.

13 Q. And during those briefings, Department of State officials
14 informed Congress that the administration felt compelled or the
15 Department of State felt compelled to say publicly that the cable
16 leak had caused serious damage to American interests in order to
17 bolster the legal efforts to shut down the WikiLeaks website?

18 A. You just read me a quotation. And it's -- are you quoting
19 me or are you quoting someone else, sir?

20 Q. I'm asking are you aware of Department of State officials
21 informing Congress that the administration felt compelled to say
22 publicly that the cable leaks had seriously damaged American

23

1 interests in order to bolster legal efforts to shut down the
2 WikiLeaks website.

3 A. I was -- I was the briefing officer at both those two House
4 Permanent Select Committee on Intelligence briefings, and I don't
5 remember saying that. I was the briefer.

6 Q. And you don't believe that is true?

7 A. I believe it caused damage, yes. But I don't think -- you
8 -- you -- the end of it is compelled to say something and I don't
9 remember saying that.

10 Q. All right. I understand your testimony under oath here is
11 that the State Department never briefed to the -- the House Permanent
12 Select Committee that the cable leaks in this instance, the
13 administration felt compelled to say to the public -- to say publicly
14 that the cable leaks had seriously damaged American interests in
15 order to -- bolster -- excuse me, bolster legal efforts to shut down
16 the WikiLeaks website?

17 A. I recall saying -- talking about the damage to the U.S.
18 national security. I don't -- I don't recall saying that, and I
19 don't recall anyone saying that in my presence.

20 Q. During those briefings, do you recall indicating to
21 Congress or saying to Congress that the impact of the cable release
22 was embarrassing, but not damaging?

23 A. I never said that.

1 Q. Anyone else from the Department of State?

2 A. Not in my presence, sir.

3 Q. Okay, so, again, under oath here today, you are saying that
4 when you briefed Congress, the State Department never stated to
5 Congress that the impact of the cable release was embarrassing but
6 not damaging?

7 A. I do recall that having been said.

8 Q. Now, I want to address a couple of the potential harms that
9 have been documented and you testified to one of those here today,
10 okay?

11 A. Counsel, yes.

12 Q. Now, there have been two types of potential chilling
13 effects from the alleged leaks. The first, that the State Department
14 will stop sharing information with other agencies, and the second,
15 that countries or individuals may stop being open and frank with us
16 as State Department members, is that correct?

17 A. No, I've only described the second. I have -- I have never
18 gone to the first.

19 Q. Well, that's not quite true. You've gone to the first when
20 you testified in front of the House Permanent Select Committee,
21 correct?

22 A. I -- no, I said -- I believe I said -- and I would have to
23 go back and see if I can obtain the classified transcript of that

1 briefing -- that we were certainly cutting off distribution via
2 SIPRNet. We're cutting off distribution ----

3 Q. I'll play a clip from your testimony, then you can comment
4 on it.

5 A. We're cutting off distribution via SIPRNet, but we were not
6 cutting off distribution via what we called Legacy SIPs, which are
7 the other distribution systems. So cut off the one, but not the
8 other. So the traffic would still be available to policymakers
9 through Legacy Systems.

10 Q. Ambassador Kennedy -- excuse me, Undersecretary Kennedy,
11 I'm going to play a clip from your testimony and then ask you to
12 comment on it.

13 MJ: Are these marked in some fashion?

14 CDC[MR COOMBS]: They're going to be, Your Honor. We may need to
15 take a slight break. For whatever reason, it's not coming up, ma'am.

16 Q. Again, you recall testifying in front of the House
17 Permanent Select Committee? Is that correct?

18 A. Yes.

19 CDC[MR COOMBS]: I'd like to play this for you.

20 RECORDING: I think the State Department though has avoided the
21 chilling effect that you are --

22 WIT: If I might --

23 RECORDING: -- directly addressing. For examples, I might,

1 during the period ----

2 WIT: -- that is not the House Permanent Select Committee on
3 Intelligence. That is the Senate -- that is the Senate Committee.
4 And so I -- everything I've said to you -- your question was,
5 counsel, your testimony for the House Permanent Select Committee.
6 This is not my testimony before the House Permanent Select Committee.
7 This is a -- this is a different hearing, and so my -- that's ----

8 Q. My question to you, Under Secretary Kennedy, was had you
9 testified about the two chilling effects. You indicated that you
10 never testified about the former.

11 A. You -- Counsel, I believe you were talking about -- you
12 said the House Permanent Select Committee. And so ----

13 Q. Well, why don't we do this; I'll repeat my question and
14 then I'll see if I need to play this, okay?

15 A. Right.

16 Q. All right. So, I'll repeat the questions as I ask them to
17 you word-for-word. I want to address a couple of potential harms
18 that have been documented basically to you, the two types of
19 potential chilling effects from the alleged leaks. The first, that
20 the State Department will stop sharing information with other
21 agencies, and the second, that other countries or individuals may no
22 longer share information with us. You indicated that you never had
23 testified about the former. Is that true or not true?

1 A. We're talking now about the Senate committee. The
2 questions posed were two-fold. Since the Senate Homeland Committee
3 was very, very concerned about -- since the -- Senator Lieberman and
4 Senator Collins were the chair and co-chair of that committee, they
5 were very concerned about information sharing because they had been -
6 - they were the authors of the Intelligence Reform and Terrorism
7 Prevention Act. Their question was directed at was the State
8 Department going to cut off the defense department from the
9 intelligence information and ----

10 Q. Yes, sir. My question, though, Under Secretary, is there
11 were two types of possible chilling effects, the first the State
12 Department will stop sharing information with other agencies. Did
13 you testify about that potential chilling effect?

14 A. To Homeland Security and the Senate, yes.

15 Q. All right. And you testified there that the State
16 Department had avoided that first kind of chilling effect?

17 A. The chilling effect on the distribution to other government
18 agencies, yes.

19 Q. All right. You said while the State Department at that
20 point had stopped its dissemination of these purported cables on
21 SIPRNet, they continued to disseminate to the intelligence community
22 system throughout other sources, one was JWICS, correct?

23 A. Correct.

1 Q. And you continued to disseminate the same volume of
2 material at the same rate with the 65 other U.S. government agencies
3 after the purported leaks?

4 A. Yes, sir.

5 Q. And the State Department, in your words, not hold anything
6 back?

7 A. Correct.

8 Q. All right. Now, the second type of potential chilling
9 effect, that is, whether or not foreign governments or citizens of
10 foreign countries would be willing to share information with us. The
11 State Department has avoided that chilling effect, too?

12 A. I do not believe so.

13 Q. Are you familiar with then Secretary Clinton's statement
14 that diplomatic cables, again, are not always accurate? Are you
15 familiar with her saying that?

16 A. I believe that she -- she -- the Secretary of State did
17 give -- did give a press conference in 2010 after the first tranche
18 of WikiLeaks, yes.

19 Q. Are you familiar with her saying that the -- in her
20 opinion, the diplomatic cables are basically passing on information
21 for whatever it's worth?

22 A. I would have to see what she said, but I remember that
23 press conference, yes.

1 Q. And do you recall her then saying that most leaders
2 understand this fact, that cables are not always accurate, they're
3 passing on information for whatever it's worth, and that she's found
4 no hesitancy on the part of leaders to share information?

5 A. That does not contradict my statement that there was a
6 chilling effect on diplomatic reporting and analysis.

7 Q. I understand that's your opinion. My question though to
8 you was are you familiar with her statement saying that she -- she
9 has found no hesitancy on the part of leaders to share information?

10 A. No part on the part of leaders sharing information with
11 her, yes.

12 Q. Okay. So you would agree with me that, obviously,
13 countries, whatever country we're dealing with, they act in their own
14 interest?

15 A. Correct.

16 Q. And the interests of each country are pretty well defined
17 by their -- either their place in the world, their economy, or their
18 history?

19 A. And current circumstances, et cetera. There are multiple
20 factors, yes.

21 Q. But these countries -- we have a -- you name a country, we
22 can have a pretty good idea of their general interests and what they

23

1 would want to have happen or not happen as far as their interests are
2 pretty well defined?

3 A. That's a -- that's a very, very broad statement, and I will
4 say yes to it as a very, very broad statement. Obviously, there are
5 many exceptions that occur in individual circumstances, a given
6 country and a given situation at a given time.

7 Q. Okay. Other countries, their diplomacy is not based on
8 whether or not they think an unpleasant article may be put out in the
9 press if they speak freely with us?

10 A. That is correct. That is correct in that sense, but it
11 does not go to the point that you're asking me about, is the chilling
12 effect on individual members of that government or individual members
13 of the private sector in that country being willing to share personal
14 opinions with United States diplomats.

15 Q. Okay. My question here, though, is that other countries'
16 diplomacy is not based on whether or not they think there's going to
17 be an unpleasant article written about them if they speak freely?

18 A. That's -- that's -- there's no yes or no answer to that
19 question, counselor.

20 Q. Well, I -- do you believe, I guess, other countries'
21 diplomacy is based upon whether or not they think an unpleasant
22 article is going to be published about them if they speak freely?

23

1 A. I think there are circumstances when certain governments
2 would base their diplomacy on that, yes.

3 Q. All right. All right, I'm sure you're familiar with the
4 comments and opinions of former Secretary Robert Gates concerning the
5 release of purported cables?

6 A. I recall generally his -- his statements.

7 CDC[MR COOMBS]: Okay, what I'd like to do is I'd like to -- and,
8 Your Honor, for the record, I started to play a portion of a -- of
9 Under Secretary Kennedy's testimony. I'll have that marked [the CD
10 was marked Defense Exhibit Echo-Echo-Echo for identification] -- it's
11 on a CD. I'll have that marked now for the record. I also have
12 another CD. I'm going to play a portion of Secretary Gates'
13 statement and ask Under Secretary Kennedy to give his opinion on
14 that.

15 MJ: All right. Go ahead.

16 RECORDING OF MR. GATES: "Now, I have heard the impact of these
17 releases on our foreign policy described as a meltdown, as a game
18 changer and so on. I think -- I think those descriptions are fairly
19 significantly overwrought. The fact is governments deal with the
20 United States because it's in their interest, not because they like
21 us, not because they trust us and not because they believe we can
22 keep secrets. Many governments -- some governments deal with us
23 because they fear us, some because they respect us, most because they

1 need us. We are still essentially -- it's been said before -- the
2 indispensable nation. So other nations will continue to deal with
3 us. They will continue to work with us. We will continue to share
4 sensitive information with one another. Is this -- is this
5 embarrassing? Yes. Is it awkward? Yes. Consequences for U.S.
6 foreign policy? I think fairly modest."

7 Q. Is that the statement that you were familiar with, Under
8 Secretary?

9 A. I believe that -- yes, I believe that was the statement
10 Secretary Gates made in 2010.

11 Q. All right. And do you disagree with his statement?

12 A. I do not disagree with his statement, but I don't think it
13 contradicts the statements I have made either.

14 Q. And why not?

15 A. Because what Secretary Gates is correctly talking about is
16 government-to-government interaction, but what I'm talking about is
17 diplomacy reporting, which is both government-to-government, but it
18 is also the interaction between individual U.S. diplomats and
19 government officials who give us their views in the expectation of
20 privacy and about U.S. diplomats interacting with private sector
21 businessmen, other officials, non-governmental officials in a host
22 country, and so the chilling effect on those interactions remain
23 valid and are not contradicted by Secretary Gates' statement ----

1 Q. And those -- that ----

2 A. ---- and nor are they encompassed in Secretary Gates'
3 statement.

4 Q. With regards to the other individuals that you're talking
5 about, members of -- not the government, but you're talking about
6 your average citizen or somebody who lives in the country?

7 A. No.

8 Q. Or who are you talking about?

9 A. No, sir. I'm talking about -- I'm talking about government
10 officials who render us their private opinions -- their private
11 analysis, which is important in helping us formulate -- I'm talking
12 about -- it could be senior businessmen, it could be senior members
13 of the -- of the educational system. It could be senior members of
14 the press. It could be senior NGO officials.

15 Q. And ----

16 A. Those are -- those are equally important in understanding,
17 in terms of U.S. national security, where a nation might be going and
18 that analytical information is critical, and that is the chilling
19 we're talking about.

20 Q. And that chilling that you're talking about is based upon
21 what you perceive or what you have heard from others a chilling
22 effect?

23

1 A. It is -- it is what has been reported to me -- I can -- as
2 examples -- and I'd be glad to go into examples in closed session --
3 of folks ----

4 Q. Well, I can I ask you a particular question. Have you had
5 anybody come to you and say "I'm no longer giving you as much
6 information as I have in the past?"

7 A. I have -- it has been reported to me that foreign officials
8 have said the equivalent to our diplomats overseas -- not to me, I'm
9 in Washington -- but have said similar constraining statements to
10 U.S. diplomats overseas.

11 Q. So, for you, that answer would be no, you haven't had
12 anybody come to you and indicate that we're no longer sharing as much
13 information with you in the past?

14 A. To me personally, no. But I am only one of 10,000 State
15 Department diplomats, and others have had it said to them.

16 Q. And when you say that they're not sharing information then,
17 you are, at that point, believing that there is some deficit in the
18 information that they would have been otherwise shared, correct?

19 A. Correct.

20 Q. So it is potentially, kind of to use Secretary -- former
21 Secretary Rumsfeld "the known unknowns", is that what you were
22 talking about?

23 A. I'm not sure it's a known, unknown. I'm sure -- I'm -- it

1 is more likely that we have, over the course of the years, had robust
2 dialogue with officials, governmental and non-governmental, of very
3 senior levels in society across the world, and there -- there is less
4 frankness, less fulsome discussions now than there were before.

5 Q. And again, that's based upon a perception?

6 A. That's based upon individuals saying to State Department
7 diplomats that -- that they -- that they doubt that or taking other
8 actions to restrict those -- those -- that frankness.

9 Q. Are you familiar with who Alex Ross is within the
10 Department of State?

11 A. Alex Ross was an -- was an information technology guru at
12 the State Department until 2012, I believe.

13 Q. Are you aware of his statements regarding the purported
14 leak of the diplomatic cables?

15 A. No, I -- I don't remember ever seeing Alex's.

16 Q. I'd like to play his statement for you and then see if you
17 would agree or disagree with it.

18 [The CD was marked Defense Exhibit Foxtrot-Foxtrot-Foxtrot for
19 identification]

20 [The following is a transcript of a portion of Defense Exhibit
21 Foxtrot-Foxtrot-Foxtrot that was played in open court in full view of
22 all court-martial participants]:

23 Interviewer: I have a big affair that came up this year is the

1 WikiLeaks one. Is the State Department still recovering from Cable
2 Gate?

3 Alex Ross: You know here is the -- here's the big headline from
4 WikiLeaks; WikiLeaks revealed massive right-doing by American
5 diplomats. You know, they -- I think that what WikiLeaks
6 demonstrated is that our diplomats are very good at their job; that
7 what we are doing privately is what we say we're doing publically.
8 So I don't think there's much to recover from. I think that -- I
9 think the United States has nothing to be -- nothing but pride in the
10 work that our diplomats have -- have done, and I don't think there's
11 anything that's been revealed that should contradict that.

12 [END OF RECORDING PLAYBACK]

13 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

14 Q. Were you aware of that statement?

15 A. No, I had not seen Alex's statement before. But, again,
16 like Secretary Gates, I do not disagree with his statement, but I do
17 not find it relevant to the point I've been making. Alex Ross was
18 talking about we need not be embarrassed by the reporting cables that
19 were filed. That's not what I'm addressing, this particular thing.
20 I'm addressing the fact that because of the information, and because
21 of the fact that people know that there's been a breach of privacy
22 and that they no longer have the expectation of the privacy, that
23 they are less willing to engage in the full and frank discussion and

1 exchange of ideas that they were willing to engage in before. So
2 Alex's statement is true and so is mine.

3 Q. Okay. With regards to the purported release, the purported
4 SIPDIS cables range from 28 December 1966 to 28 February 2010, is
5 that correct?

6 A. I believe that's correct, yes.

7 Q. And the vast majority of these purported cables from came
8 2004 or later?

9 A. I believe that's correct, yes.

10 Q. And that was roughly the time period in which cables were
11 beginning to be shared on the Net-Centric Diplomacy database?

12 A. That is -- that is how SIPDIS cables -- that's where SIPDIS
13 cables went was to the Net-Centric Diplomacy database, yes.

14 Q. And of the 251,287 purported SIPDIS cables, 133,887 of them
15 were unclassified, is that correct?

16 A. I think -- I think that's about right. It was about 50/50
17 if my recollection is correct, yes.

18 Q. And then 101,748 were classified as confidential?

19 A. I believe that's also correct.

20 Q. And finally, 15,652 were classified as secret?

21 A. Correct.

22 Q. And you conducted a classification review of a certain
23 subset of the purported Department of State cables?

1 A. Are we referring, Counsel, to the -- to the -- to the -- to
2 the filing of the 100 or so cables in the -- okay -- yes.

3 Q. Yes. So you did a classification review of those cables?

4 A. Correct.

5 Q. And you were selected to do that review based upon,
6 basically, your duty position?

7 A. Yes, the Under Secretary for Management's responsibility as
8 the senior classification officer by delegation from the Secretary of
9 State.

10 Q. And prior to this one, you had never done a classification
11 review before?

12 A. I looked at individual cables. I had classified cables,
13 but I had not done -- I have not done a filing such as this, no, sir,
14 never before.

15 Q. And you had assistance, obviously, in completing this
16 classification review?

17 A. Yes.

18 Q. And who, in general, assisted you?

19 A. This was subject matter experts within the State
20 Department, both subject matter as to the rules and regulations of
21 classification and subject matter as to the content of the cable, so
22 the regional or functional bureau -- experts on that matter and the
23

1 classification experts from the Department to the rules and
2 regulations.

3 Q. And how did they assist you in the review?

4 A. They prepared -- they prepared what is called an action
5 memo to me, which is a memo saying that we've conducted the review,
6 here is the material outlined, the situation, and said do you -- do
7 you concur or non-concur, do you approve or disapprove the attached
8 filing. And so I read through the filing and -- and concurred in it.

9 Q. No one actually sat down and briefed you on any of the
10 hundred or so purported cables?

11 A. No, no one sat there and briefed me on every -- no.

12 Q. And when you reviewed the document, the document that you
13 reviewed was ultimately the document that you signed, is that
14 correct?

15 A. That's correct. And I also had -- I believe -- if my
16 recollection is correct -- this is some time ago -- I believe I also
17 had a binder which had the cables themselves.

18 Q. Did you actually type any of the classification review?

19 A. No, sir.

20 Q. Did you make any changes to the classification review?

21 A. No, because I concurred in it.

22 Q. And you indicated that you thought you had an attachment
23 with the 100 or so purported cables?

1 A. That's the best of my recollection.

2 Q. Did you read each cable from start to finish as you were
3 doing your classification review?

4 A. I would read the -- the document, and then I think I
5 skimmed through the cables.

6 Q. So the answer would be no, you didn't read each cable from
7 start to finish?

8 A. I did not -- I do not believe I read each cable word-for-
9 word, no.

10 Q. What classification guide did you use to complete your
11 classification review?

12 A. The -- the current classification guide, which is
13 confidential; you have damage, grave damage, and exceptionally grave
14 damage, confidential, secret, and top secret, which is the cur ----

15 Q. Did you actually have that classification review next to
16 you as you were doing this ----

17 A. No.

18 Q. ---- or -- excuse me, classification guide?

19 A. No, sir.

20 Q. What is ----

21 A. When you classify -- when you classify cables, you -- you
22 have taken in what the guidelines are, and then you do that -- since
23 I classify cables all the time, I know what -- I know what the rules

1 are. When I'm reviewing something that someone else classifies, I
2 use the same processes that -- when I would classify a cable in my
3 own right.

4 Q. All right. So then you didn't feel the need at that point,
5 based upon your experience and knowledge, to use the classification
6 guide?

7 A. No, sir. I used the principles of the classification
8 guide, not a hard copy.

9 Q. And what experience do you have in using the classification
10 guide -- actually physically using it?

11 A. I am -- I as the -- as the agency officer in charge of
12 classification, I am the person who signed and approved the
13 classification guide. And also from 1993 to 2001, when I was
14 Assistant Secretary of State for Administration, the classifications
15 and records management office in the Department worked directly for
16 me. So I have an intimate knowledge of how -- of how they work in
17 the processes.

18 Q. And when you -- when you say they worked for you, were you
19 actually reviewing what was put into the classification guide or
20 based upon your position were they simply telling you they're
21 completing the classification guide and then giving it to you for
22 your signature?

23

1 A. They would give it to me for my concurrence or clearance.
2 Q. Did you -- before you signed it, I guess, did you review
3 the entire classification guide?
4 A. I read what I sign.
5 Q. All right. So I guess the exception, then, would be just
6 reading the entire cables when you're doing the classification
7 review?
8 A. That is correct.
9 Q. Now, you had testified about -- now we are talking about
10 the August of 2011 damage assessment, okay ----
11 A. Okay.
12 Q. ---- the draft damage assessment. Did you -- did you
13 review that draft damage assessment from start to finish?
14 A. I read the entire damage assessment, yes.
15 Q. Okay. 'Cause -- was this something else that you had
16 signed?
17 A. I never signed it.
18 Q. Was it done at your request?
19 A. I requested it be done, yes.
20 Q. And was it something that needed to have a signature then?
21 A. I would have approved it. If it had been -- in August of
22 2011, if it would have been the damage assessment, but given the
23 passage of time and its preparation and as we were reviewing it, we

1 were marching on to the Labor Day release of the next tranche of
2 cables. I decided that the damage assessment draft was a snapshot in
3 time, which was not an accurate representation of the situation
4 because the next tranche of WikiLeaks material purported cables was
5 about to be released and, therefore, saying that this represented the
6 -- the damage assessment would have been an inaccurate statement for
7 me to make and approve.

8 Q. All right. And you had indicated that because of the fact
9 that the State Department viewed this as a crisis, that you -- you
10 basically went into a crisis management mode, correct?

11 A. Correct.

12 Q. And, obviously, by just using the term "crisis" that means
13 it's something that's serious?

14 A. Correct.

15 Q. And you had said on direct that it was, in fact, very, very
16 serious and that's why you had ----

17 A. Correct.

18 Q. ---- conducted your response. And that's also why you had
19 the impact review going initially to see what the impact ----

20 A. Yes.

21 Q. ---- was of the purported leak, is that right?

22 A. Correct.

23

1 Q. You had indicated that you reviewed this draft in August of
2 2011, but you -- at least at the time of the draft, you -- did you
3 approve or not approve of what was said in the draft?

4 A. It never reached that point. I did not approve or
5 disapprove it because there was a second tranche of documents coming,
6 and that for me to have said this represents a damage assessment for
7 the purported WikiLeaks release would have been inaccurate because it
8 was not the entire scope ----

9 Q. All right.

10 A. ---- and, therefore, I ----

11 Q. And you indicated it was a snapshot, basically, is what you
12 thought up until that point?

13 A. It was a snapshot, yes.

14 Q. And it was a snapshot up until that point, correct --
15 August of 2011?

16 A. It was a snapshot of the first tranche, yes.

17 Q. And you haven't updated this damage assessment since,
18 correct?

19 A. Correct.

20 Q. You haven't taken any more snapshots in time?

21 A. No.

22 Q. And it's obviously possible to do that, is it not?

23 A. It is.

1 Q. And isn't it possible, if you don't do that, that you would
2 miss something?

3 A. No.

4 Q. You don't think it's possible that you might miss some
5 potential damage if you don't -- if you don't do a Department of
6 State-wide damage assessment?

7 A. No, because a damage assessment of this nature is very
8 different in my mind from other damage assessments that are done.
9 Other damage assessments to which I'm aware of or compromise of a
10 piece of equipment or an -- an -- a case of an individual with
11 limited -- with limited access that he or she has to a string of
12 cases. At 251,000 cables, this is a much wider range and, therefore,
13 the scope of damage is much wider.

14 Q. Right, but if you -- if you took snapshots in time, I guess
15 maybe at the end of 2011, end of 2012, maybe coming up end of 2013,
16 you would have snapshots as to the damage at that point -- at that
17 point, would you not?

18 A. It's a very, very labor intensive activity to engage in
19 such -- in such damage assessments. The damage assessments -- we are
20 -- we are aware of the damage that has been done as I have outlined;
21 the chilling effect and, therefore, I do not see a need to do a
22 snapshot now because the -- because the damage continues to roll on.
23

1 Q. Now, I guess if -- I mean, that's obviously your opinion
2 that it continues to roll on, if you did a final damage assessment or
3 a damage assessment that was a snapshot, we would have a State
4 Department position as to what the damage was at that point, would we
5 not?

6 A. Snapshots -- snapshots, I do not believe are a valid tool
7 when you have an ongoing situation.

8 Q. Do you know whether or not there is a final damage
9 assessment in the works?

10 A. I'm not aware of a State Department final damage assessment
11 in the works, no.

12 Q. Has anyone ever spoken to you or indicated to you that a
13 final damage assessment will be completed at some point?

14 A. I know that the -- I know that the Department of Defense
15 has done work, and I believe the intelligence community has done
16 work, but for -- in terms of the State Department, no.

17 Q. Now, obviously, you had indicated that you were and have
18 been a part of the Department of State since 1973?

19 A. Yes, sir.

20 Q. And clearly, being part of an organization for this length
21 of time, you have a vested interest in making the Department of State
22 look good?

23

1 A. That's another question that I don't think is amenable to a
2 yes or no answer.

3 Q. Okay. You can -- you don't have to simply limit it to a
4 yes or no. You can give me a longer answer if you wish.

5 A. Of course, I've been a -- I've been a Foreign Service
6 officer for 40 years. Of course, I am proud of the agency at which I
7 work. I am proud of our agency's contribution to the national
8 security, but I don't think that pride goes to the point of saying
9 that I will defend the State Department at any cost and/or defend the
10 State Department when it's wrong.

11 Q. Now, let's talk about this draft damage assessment a little
12 bit more. Obviously, it was an investigation as to, at that point,
13 what the damage was, would you agree?

14 A. It was a review of reports from the field, yes.

15 Q. And just as a general standpoint or proposition, it's
16 important to complete investigations?

17 A. This is not -- this is not an investigation. I totally
18 agree -- if you take the word investigation -- "investigation" has a
19 particular art form, I'm sure, in the law enforcement community, and
20 I know what investigations are because the State Department's law
21 enforcement arm works for me, but this was not an investigation.
22 This was -- this was an analysis, and the snapshot analysis has not
23 been completed because the damage continues to roll out.

1 Q. Well, obviously, you had just testified that you would have
2 no desire to minimize an investigation just because it might make the
3 State Department look bad, is that correct?

4 A. I said -- absolutely. I said I have no desire to -- to
5 either perjure myself or -- or lower my -- my standards by -- by
6 doing something that's inappropriate.

7 Q. And with regards to an investigation, if the investigation
8 indicated or a damage assessment indicated that there was no damage
9 or it was simply embarrassment, then, at that point, based upon what
10 you just said, your interest would be to have that completed and
11 known, is that correct?

12 A. Well, if we were talking about a -- an informal
13 investigation or if we had talked about -- if we are talking about a
14 snapshot that showed that there was no damage, I would take that
15 position. But this was not an investigation. This was an analysis,
16 and the analysis didn't -- even, at the snapshot point in time, did
17 not show no damage.

18 Q. All right. And even at this point, though, there's been no
19 need or desire to do another snapshot?

20 A. No, sir.

21 [Pause]

22 Q. You had said that your desire would not be to stop an
23 investigation or -- or cease an investigation just because it might

1 make the State Department look bad, right?

2 A. I said I would not stop an investigation if it would --
3 just because it would make the State Department look bad, yes.

4 Q. Is there any sort of investigation now into you for that
5 very thing of stopping an investigation?

6 A. There is somebody who wrote a letter saying that I stopped
7 an investigation, yes.

8 Q. And is that being investigated at this point?

9 A. Of course, when something is investigated, it's looked into
10 by the State Department's IT.

11 Q. And is the allegation essentially that you stopped the
12 investigation in order to avoid the State Department from looking
13 bad?

14 A. No. I have no idea what the -- what the allegation is. It
15 just says that I stopped an investigation. And it happens to be
16 entirely false.

17 Q. Okay. The ambassador that it dealt with, was that person
18 replaced?

19 A. That person -- that per -- the individual who was there had
20 a four-year appointment, and when the -- when -- when administrations
21 change, including a President to a reelected sitting President, the
22 four years is up, and the individual did not leave short of tour.
23 No, he was not replaced because of the accusations.

1 Q. Okay.

2 A. His tour was up.

3 Q. And currently, right now, you said that investigation is
4 ongoing?

5 A. I believe the inspect -- you'd have to ask the inspector
6 general about -- that inspector general is outside of my purview.

7 CDC[MR COOMBS]: All right. No further questions.

8 MJ: All right, government, you want a recess before we go to
9 redirect?

10 TC[MAJ FEIN]: Yes, ma'am.

11 MJ: How long?

12 TC[MAJ FEIN]: May I have a moment, Your Honor?

13 [Pause]

14 TC[MAJ FEIN]: Ma'am, may we have a 10-minute recess?

15 MJ: All right.

16 TC[MAJ FEIN]: We don't anticipate a long redirect, ma'am.

17 MJ: Under Secretary Kennedy, same rules apply. Please don't
18 discuss your testimony during the recess. Court will be in recess
19 until in 10 minutes to 1300.

20 **[The court-martial recessed to order at 1238, 5 August 2013.]**

21 **[The court-martial was called to order at 1251, 5 August 2013.]**

22 MJ: Court is called to order. Let the record reflect that all
23 parties present when the Court last recessed are again present in the

1 court. The witness is on the witness stand. Redirect?

2 TC[MAJ FEIN]: No, ma'am.

3 MJ: Under Secretary, I have a couple of questions. I just need
4 to find them.

5 **EXAMINATION BY THE COURT-MARTIAL**

6 **Questions by the military judge:**

7 Q. You testified earlier that -- I just found them. You
8 testified earlier on direct examination that I believe -- and please
9 correct if I have misquoted your testimony -- that there were
10 approximately 250,000-plus cables on the NCD database and on the
11 SIPRNet back in 2010?

12 A. Yes, Your Honor.

13 Q. And that there were approximately 2.4 million other cables?

14 A. Not sure under -- well, the State Department produces, as I
15 mentioned, lots of diplomatic reporting and other administrative
16 cables. Only a certain percentage of those carried the SIPDIS
17 caption, which then pushed them into the -- into the NCD -- the Net-
18 Centric database. The re -- there were -- there was a full range of
19 different types of reporting in there and there was a full range of
20 reporting on the cables as well.

21 Q. Does the -- these other 2.4 million cables, I know you
22 testified in response -- I believe it was to defense counsel's

23

1 questions -- that there were a variety of different kinds of
2 distribution systems that were very limited ----

3 A. Yes.

4 Q. ---- like NODIS and some of the other ones. Was it the
5 Department of State's intent to release or allow other agencies to
6 view cables that -- that could help them in their national security -
7 ---

8 A. Absolutely.

9 Q. ---- jobs with SIP -- with SIPDIS?

10 A. Both SIPDIS and what we just called, for want of a better
11 term, the legacy distribution systems. We pushed cables out to a
12 wide range; classified and unclassified. For example, we send cables
13 to the Food & Drug Administration. We send cables to the
14 export/import bank. It depends on what the subject matter of the
15 cable is. We -- we get them to whatever U.S. government agency needs
16 that cable in order to do its mission. SIPDIS was an invention at
17 the request of the Department of -- the Department of Defense and the
18 intelligence community -- Office of the Director of National
19 Intelligence saying -- trying to help in the distribution of cables
20 at the agency end. That the system that we had which simply pushed
21 the cables from the State Department's communication center to the
22 communications center of the other agency where they then had to
23 redirect -- they had to direct them to the respective entities in

1 their entities. They were having a problem with that. And so it was
2 can you push some of your reporting cables to this Net-Centric
3 Diplomacy database using the SIPDIS caption? And then the
4 appropriate analyst would pull the cables in their area of
5 responsibility down. And it was an attempt to -- to ease the
6 distribution burden on the part of the other agencies. But this is
7 all part of our intent to make State Department diplomatic reporting
8 available to any agency in the United States government with
9 classified personnel, who will maintain -- because we have an
10 agreement -- we have an agreement that goes back years and years with
11 the Department of Defense, for example, that says that -- that the
12 agency receiving the classified material takes responsibility for
13 ensuring that those who are given access to it have the appropriate
14 clearances because it would be -- for the State Department to try to
15 find analyst "A" at Fort Huachuca, or analyst "B" at Bolling, or
16 analyst "C" at Fort Gordon, that's is just simply beyond our ken. So
17 we push it -- we push it out and then other agencies either
18 distribute it or they pull it.

19 Q. All right. Thank you. Just shifting to another area now,
20 you testified in your opinion that the communications between -- not
21 from government-to-government level, but with the diplomats and the
22 people they talked to ----

23 A. Yes, ma'am.

1 Q. ---- in the foreign countries is chilled. And I believe
2 you testified that that was reported to you. How -- how frequently?
3 A. We have -- we have examples and I would be ----
4 Q. I'm not asking you to go into the specifics --
5 A. We have ----
6 Q. ---- of anything ----
7 A. ---- we have ----
8 Q. ---- just give me a flavor for numbers.
9 A. It's a relatively small number of people actually
10 expressing it, but more of our colleagues have a sense that they --
11 that the dialogue that they are engaging in with the foreign
12 interlocutors is not as full as it once was before. Several cases --
13 people have just said we're -- we cannot -- we're not going to share
14 with you like we used to. Other cases of individuals just feeling
15 that they're not getting the kind of -- kind of exchanges that they
16 had before the -- the WikiLeaks.
17 Q. Now, these disclosures took place in -- I believe in the
18 Department of State cables, you were talking about November of 2010,
19 followed by the second tranche, as you described it, in September of
20 2011.
21 A. Yes, Your Honor.
22 Q. These feelings that you're talking about, were they
23 manifest -- expressed to you in 2011, 2012, 2013?

1 A. They -- they started -- they started in 2010, and I believe
2 that -- that my colleagues abroad are still feeling the chill. But I
3 cannot -- I cannot go to the depth of -- it's impossible to know what
4 someone is not sharing with you, and that is, in itself, I believe, a
5 risk to national security.

6 Q. And, I know you did testify about this, I just want to make
7 sure I'm clear on that. You testified earlier, I believe, in
8 response to defense counsel's question that there was a draft damage
9 assessment done in draft form approximately around August 2010,
10 before the next wave of releases?

11 A. Your Honor, it was August 2011.

12 Q. I'm sorry, August 2011.

13 A. 2011. It reached me -- I was reviewing it, talking to
14 people, and then the second -- Labor Day -- the Labor Day second
15 large tranche of purported documents were released. And so, at that
16 point, it was clear to me that the -- that the -- that the earlier
17 snapshot, which showed, you know, bad results from the leaks, it was
18 not -- and it hadn't done after, you know, a year of -- it was not
19 appropriate to restart it again because it would -- the sec -- it
20 would -- we would need time to -- for the second to play out.

21 Q. And if you can't answer this in an open setting, please
22 don't, but with the original draft, was there -- did that encompass

23

1 an assessment of everything that the Department of State thought
2 might be released or what was released?

3 A. No -- was released.

4 MJ: Any follow-up based on that?

5 TC[MAJ FEIN]: No, ma'am.

6 CDC[MR COOMBS]: Yes, Your Honor.

7 **RECROSS-EXAMINATION**

8 **Questions by the civilian defense counsel [MR. COOMBS]:**

9 Q. The legacy distribution system, if you could, explain that
10 in general format for the Court.

11 A. Certainly. A telegram would arrive at -- at the State
12 Department's communication center in Washington. It would be read by
13 an artificial intelligence looking at the caption, looking at the
14 tags. Tags are a four-digit or two-digit in detention indicator.
15 Every country in the word has two letters, and there are a series of
16 tags which are arranged from "A" tags, which are administrative to
17 "P" tags, which are political reporting, to "E" tags, and then the
18 following three letters mean the type of economic political cultural
19 counselor activity. And so this automated intelligence reads all of
20 this and decides that this information is a value to the national
21 security staff -- the Department of Defense or to whomever depending
22 on the subject on the base of this. And then pushes that message
23 over classified circuits to a designated communications center at

1 whatever agency involved. And then that agency, on receipt of it,
2 makes distribution within its entity to whomever it deems appropriate
3 with the -- with the security clearances.

4 Q. When you had testified that during the same time 250,000
5 SIPDIS cables were put in the Net-Centric database

6 A. Right.

7 Q. ---- you had 2.4 million cables ----

8 A. Right.

9 Q. ---- unrelated to that going through these legacy
10 distribution systems?

11 A. Correct.

12 Q. And those were going to the other 65 interagency partners?

13 A. They were going to all -- well, not everyone ----

14 Q. Right.

15 A. -- to every 65, but the one that the -- AMADs -- A-M-A-D-s,
16 the distribution system picked up and decided should be routed there
17 on the basis of reading the -- reading the cable, looking for
18 keywords and terms, the tags, and the -- the -- the captions, if
19 there were any.

20 Q. And that number, that 2.4 million, that was for 2005 to
21 2010?

22 A. Yeah. It -- it was for a comparable period.

23 Q. Okay.

1 A. And there was obviously a lot of administrative processing
2 cables in that period as well.

3 Q. Now, with regards to the small number of people that --
4 that had expressed a kind of chilling effect, and then the colleague
5 saying I think there's a greater number of people, at least per our
6 impressions, did the State Department ever quantify that or graph
7 that in any way to show?

8 A. No. No. There also is a belief also there have been -- we
9 had to make personnel changes at some embassy; and I don't want to go
10 into any greater depth than to say that. So that's another example
11 of a chilling effect.

12 Q. With regards to the chilling effect that you believe is
13 present, did that wane at all from 2011 - 2012?

14 A. I believe that's -- I believe that's hard to tell. I don't
15 -- I don't believe we have the full measure yet. I cannot answer
16 that question. I wish I could, but I cannot.

17 Q. So from your perspective, at least from what you can see
18 and what you understand, you can't discern a difference between what
19 might have been the chilling effect in 2011 - 2012 vice 2013?

20 A. It's -- I -- it's the same chilling effect. If you're
21 trying to -- I can't ----

22 Q. No, just the level of it.

23 A. No -- no, I cannot.

1 CDC[MR COOMBS]: Okay. No further questions, ma'am.

2 MJ: All right. Thank you.

3 TC[MAJ FEIN]: May we have a moment, Your Honor?

4 MJ: Yes.

5 [Pause]

6 **REDIRECT EXAMINATION**

7 **Questions by the trial counsel [MAJ FEIN]:**

8 Q. Sir, in reference to your testimony just now, specifically
9 about the 2. -- approximately 2.4 million cables through the legacy
10 system, what did you mean by alleged contained admin' type cables?

11 A. I mean, they would -- there was some percentage of those
12 cables -- and, Major, I don't have the exact number -- that -- that
13 would never have been -- catagor -- you know, candidates for -- for
14 SIPDIS. Since I was interpreting that as a question about
15 potentially comparing the -- the relative sizes -- cables reporting
16 on freight movements, travel orders, assignment notifications,
17 temporary duty, flight arrivals, those -- those would have been in
18 there. So a 2.4 to 250,000 is not a -- is not a direct 10 to 1
19 comparison because what would have been put in -- in SIPDIS is not --
20 we would not have loaded those kind of administrative tract --
21 financial -- here is -- here American embassy's Shangdu's financial
22 allotment for the -- for the next quarter. Those would not have been
23 put in SIPDIS.

1 Q. And, sir, as far as the classification breakdown of 251,000
2 purported cables, those cables are never reviewed for their actual
3 classification, correct?

4 A. We never reviewed all 250,000, no.

5 Q. So those numbers, sir, that you gave during cross-
6 examination, the breakdown -- about 50 percent were unclassified, 50
7 percent were classified, what do you mean by that?

8 A. Well, the -- well, we didn't -- when you say reviewed --
9 when you said reviewed for classification, I was using the same
10 phraseology as defense counsel had been using. We -- we were able to
11 aggregate and disaggregate them of how many were classified and how
12 many were unclassified. But we did not consult -- conduct a review
13 of the -- of the about half which were classified in the same way
14 that the -- that the filing did.

15 TC[MAJ FEIN]: Yes, sir. Thank you, sir.

16 MJ: Anything else?

17 CDC[MR COOMBS]: Nothing, Your Honor.

18 MJ: I just have one last one based on that.

19 **EXAMINATION BY THE COURT-MARTIAL**

20 **Questions by the military judge:**

21 Q. The -- can you give me a flavor of -- you said that there's
22 2.4 and it's not a direct correlation with the 250,000 that were on
23 SIPDIS because you have these administrative and -- do those

1 administrative and, I guess, cables that are only of interest to a
2 few people that wouldn't go out to the interagency, out of the 2.4
3 million, would that be, say, 50 percent, 25 percent, 75 percent? I
4 don't need an exact figure, but this ----

5 A. Your Honor, I -- I would be only guessing. And I'm very,
6 very hesitant to do that ----

7 Q. All right. And I'd like you ----

8 A. ---- just because ----

9 Q. ---- not to. So that's fine.

10 Q. ---- just because that's not a way that I've ever -- I've
11 ever cut them in my mind or had it presented to me.

12 MJ: All right. Any follow-up based on that?

13 CDC[MR COOMBS]: No, Your Honor.

14 TC[MAJ FEIN]: No, ma'am.

15 MJ: May this witness be excused?

16 TC[MAJ FEIN]: Yes, ma'am. Permanent excusal.

17 **[The witness was permanently excused, and withdrew from the**
18 **courtroom.]**

19 MJ: All right. We talked earlier today about proceeding with
20 the unreasonable multiplication of charges motion potentially this
21 afternoon. How would the parties -- would you like to confer and
22 decide how you might like to proceed?

23

1 TC[MAJ FEIN]: Yes, ma'am. We -- we conferred during the last
2 recess. The United States requests that we reconvene at 1430, which
3 will give us enough time for lunch, and then hopefully to agree on
4 this proffer of expected testimony -- and write it.

5 MJ: All right. And then we'll have oral argument with respect
6 to that motion?

7 CDC[MR COOMBS]: Yes, Your Honor.

8 TC[MAJ FEIN]: Yes, ma'am.

9 MJ: Okay. And is there anything else we need to address today?
10 I assume we're not going to have any other witness from the
11 government?

12 TC[MAJ FEIN]: No, ma'am.

13 MJ: Okay. 1430. All right. Court is in recess until 1430.

14 **[The court-martial recessed at 1309, 5 August 2013.]**

15 **[The court-martial was called to order at 1441, 5 August 2013.]**

16 MJ: Court is called to order. Major Fein, please account for
17 the parties.

18 TC[MAJ FEIN]: Your Honor, all the parties when the Court last
19 recessed are again present, with the exception of Captain Overgaard.

20 MJ: All right. Thank you. I've been handed a copy of
21 Appellate Exhibit 635, which is a Stipulation of Expected Testimony
22 of Special Agent David Shaver. Did both sides come to agreement with
23 regard to the stipulation?

1 TC[MAJ FEIN]: Yes, Ma'am.

2 CDC[MR COOMBS]: Yes, Your Honor.

3 MJ: PFC Manning, we've been through this before.

4 ACC: Yes, Your Honor.

5 MJ: Is that your signature there on the bottom of -- the bottom

6 right corner of the Stipulation of Expected Testimony for Special

7 Agent David Shaver?

8 ACC: Yes, Your Honor.

9 MJ: Before signing the Stipulation, did you read it thoroughly?

10 ACC: Yes, ma'am.

11 MJ: You understand the contents of the Stipulation?

12 ACC: I do, ma'am.

13 MJ: Do you agree with the contents of the Stipulation?

14 ACC: Yes, Your Honor.

15 MJ: Before signing the Stipulation did your defense team

16 explain the stipulation to you?

17 ACC: Yes, Your Honor.

18 MJ: You understand you have an absolute right to refuse to

19 stipulate to the contents of this document?

20 ACC: Yes, ma'am.

21 MJ: You understand that you should only enter into a

22 stipulation only if you believe it's in your best interest to do

23 that?

1 ACC: Yes, Ma'am.

2 MJ: And you understand this is a stipulation of expected
3 testimony. And, once again, what that means is, when counsel for
4 both sides and you agree to a stipulation of expected testimony,
5 you're agreeing that if Special Agent David Shaver were here in Court
6 and testifying under oath, he would testify substantially as set
7 forth in Appellate Exhibit 635. A stipulation can be -- it does not
8 admit the truth of a person's testimony. The stipulation can be
9 contradicted, attacked, or explained in the same way as if the person
10 was testifying in person. Do you understand that?

11 ACC: Yes, ma'am.

12 MJ: And knowing everything I have told you and your defense
13 counsel has told you, do you still want to enter into this
14 stipulation?

15 ACC: Yes, Your Honor.

16 MJ: All right. Now this is not admitted into evidence. This
17 is an appellate exhibit that I'll consider for purposes of this
18 motion. All right. So we have three motions here. Are the parties
19 ready to argue? Let's start with the motions to merge Specifications
20 4 and 6 of Charge II for findings.

21 CDC[MR COOMBS]: Yes, Your Honor.

22 MJ: Before you start, I do have a question for you. Where is
23 my evidence that this is -- that these -- the -- the acts in

1 Specifications 4 and 6 happened at the same time, same date?

2 CDC[MR COOMBS]: Yes, Your Honor. And that's where Special Agent
3 David Shaver's stip of expected testimony will come into handy --
4 into hand.

5 The evidence that you had essentially was the SIGACTs from
6 both Iraq and from Afghanistan were taken from the T-SCIF and
7 ultimately placed on a SD card. And the evidence was that the -- the
8 dates or the last written date on the SD card were 5 January 2010 for
9 the Iraq SIGACTs, and 8 January 2010 for the Afghanistan SIGACTs.
10 The important fact to note though is that's the last date in which
11 something was changed, not the date in which those items were placed
12 on the SD card. So, in other words, you could have a CD in -- in the
13 SCIF that you -- you've taken all the SIGACTs up to December 31st of
14 2009, which is -- that's the evidence, and you burned all that on 3
15 January 2010, and then that CD stays in the SCIF. You do the same
16 thing up to December 31st, 2009, for all the Afghanistan SIGACTs, and
17 you burn a CD, and that CD is burned on 8 January 2010.

18 MJ: So you are arguing to me that up until it leaves the SCIF
19 everything is legitimate and is not part of the theft.

20 CDC[MR COOMBS]: That's correct. And that we've got plenty of
21 evidence from the witnesses who've testified that there was no
22 prohibition on -- on saving this information or any other information
23 that you wanted from SIPRNet onto a disk. Now you do have -- and

1 then here you don't even have the use of a Wget or anything like
2 that. You have a legitimate export monthly of Excel SIGACTs which,
3 again, I know ----

4 MJ: That has to assume. I don't have to find -- I don't find
5 an intent to steal on the 3rd of January and on the 7th of January,
6 right?

7 CDC[MR COOMBS]: Right. If the -- if the idea was -- if the
8 Court was convinced based upon the evidence that the intent to steal
9 or to permanently deprive or what not was done at the time these
10 things were being pulled month by month -- I guess that could even go
11 back to sometime when he initially started saving them. But I think
12 the evidence shows -- and Chief Hack's testimony helps support this -
13 - that PFC Manning was one of those individuals who was very, very
14 organized, saved an immense amount of information and files. And
15 also from the testify of Captain Fulton, he was even given a task of
16 going back for the last year going through the SIGACTs and pulling
17 them in order to discern the attacks on the brigade over the past
18 year. So he was pulling stuff for legitimate purposes. I think the
19 evidence would be more supportive of the idea that he was pulling all
20 these because he could -- export them bimonthly, just have them all
21 on the CD. And the actual taking from the T -- from the T-SCIF back
22 to his CHU, that's what's important from Special Agent Shaver's
23 testimony in that those dates don't mean anything with regards to

1 when it was put on the SD card because the last written date would
2 not change. It would stay the same unless somebody went in and --
3 and altered a period or did some modification, and then you would
4 have a change. So, as Special Agent Shaver testified in the stip
5 expected testimony, he has no way of knowing whether or not that was
6 done on the SIPRNet or the personal Mac computer, and no way of
7 knowing the date -- the exact date in which it was moved to his
8 personal Mac computer.

9 So just as -- as the -- there is no, I guess, argument with
10 regards to Specifications 5 and 7, that they were given on the same
11 date and time, the government's position -- or, excuse me, the
12 defense's position is that the evidence elicited by the government,
13 and on cross by the defense, and through this stip of expected
14 testimony, would support that the taking of the SIGACTs were done at
15 the same time as well.

16 MJ: All right. Talk to me once again. So we've got the
17 contents that are listed on Prosecution Exhibit 50; they've got the
18 last written date on 1-8 -- January 8th for the Afghanistan events
19 and January 5th for the Iraq events.

20 CDC[MR COOMBS]: Yes, ma'am.

21 MJ: Now what is the significance of that versus the last
22 paragraph where they're talking about the 30th of January?
23

1 CDC[MR COOMBS]: That the only -- when you have the two last
2 written dates, that's the last time something was modified. And you
3 can't tell if that was done in the T-SCIF or that was done on PFC
4 Manning's personal Mac computer. So there's no way of knowing that.
5 All we know is those were the last dates that that dataset was
6 modified in some way. The 1-30-2010 date, the government is saying
7 that because his computer was -- was wiped on the 31st, that we know
8 it must have gotten on his computer by the 30th. That is their
9 belief. And that's what Special Agent Shaver would testify to.

10 MJ: Okay. All right. I think I understand the defense's
11 position. Why don't we go all the way through the defense arguments
12 here and then I'll switch over to the government.

13 CDC[MR COOMBS]: Sure, Your Honor. Five and seven; just very
14 straightforward, we agree that that occurred on the same date and
15 time. The government doesn't object to merging them for sentencing,
16 but does object to findings ----

17 MJ: Let me ask you a question on this one; you haven't asked me
18 to merge them for sentencing. Should I not merge them for -- should
19 I not merge them for findings -- that's Specification 4 and 6, and
20 Specification 5 and 7 of Charge II; do you want me to consider them
21 as one for sentencing?

22 CDC[MR COOMBS]: I did ask for my Category I offenses, I
23 asked to merge 4, 5, 6 and 7 into one specification. But then, in a

1 footnote in my motion -- my UMC motion, I -- I highlight the fact
2 I've already asked that you combine 4 and 6 for findings and 5 and 7
3 for findings.

4 MJ: Okay. Okay.

5 CDC[MR COOMBS]: So I guess, if the Court didn't do 4 and 6
6 or 5 and 7 for findings, then my request for sentencing would be
7 combine those four into one ----

8 MJ: Okay.

9 CDC[MR COOMBS]: ---- 10-year offense. And -- and that
10 really kind of gets us then to the -- the UMC for sentencing motion.
11 And as ----

12 MJ: Maybe I'm not understanding your motion. Let me make sure
13 ----

14 CDC[MR COOMBS]: Yes, Your Honor.

15 MJ: ---- so in Category I of your unreasonable multiplication
16 for sentencing, I thought you were asking me for three separate
17 specifications -- 4 and 5, 6 and 7, and 8 and 9, so basically
18 considering each of those pairs as mul -- unreasonable multiplication
19 of charges. You want me to consider all six of them as one offense?

20 CDC[MR COOMBS]: No, Your Honor, 4 and 5, and 6 and 7 -- so I
21 divided up between the 641 and 793 offense ----

22 MJ: Yes.

23

1 CDC[MR. COOMBS]: ---- and then for 4, 5, 6, and 7, I said
2 combine them into one offense.

3 MJ: Okay, where did you say that? Maybe I'm confused.

4 [Pause]

5 CDC[MR COOMBS]: On the conclusion, 9(A) on Page 4, ma'am.

6 MJ: Okay. All right. I got it.

7 CDC[MR COOMBS]: So with regards to the Category I, you have the
8 641 offense; the taking, and the 793 offense; the giving of the
9 information to an unauthorized individual. So, the defense's
10 argument is essentially that 4, 5, 6 and 7, and 8 and 9 is conduct
11 that essentially rose out of the single ongoing act and part of the
12 same impulse. The exact reason in *U.S. v. Campbell* ----

13 MJ: So now you want 8 and 9 with 4, 5, 6 and 7?

14 CDC[MR COOMBS]: No. I'm -- I just combined those because
15 they're 641 and 793 offenses.

16 MJ: Okay.

17 CDC[MR COOMBS]: But -- no -- 4 and 5 into one offense, 6 and
18 7 into one offense, then, in my conclusion, combined those into one -
19 - 8 and 9 into one offense.

20 MJ: Okay.

21 CDC[MR COOMBS]: And -- and the reason why is because they
22 are part of that single ongoing act of the actual taking in order to
23 -- to give to an unauthorized individual. And here I think -- and

1 this also kind of applies to the -- the 641 offense in Category II of
2 Specification 12 and Specification 13 for the 1030(a)(1). The
3 defense's argument there is similar, in that you have an ongoing act.
4 In order to actually give it to an unauthorized person, you know,
5 exceed your authorized access, the taking of that is the single
6 ongoing course of action. And when you look at the government's
7 filing in Appellate Exhibit 599, that was their initial response to
8 the 917 motions, the government consistently argued that the theft of
9 the records was tied to the actual unauthorized disclosure of the
10 records. And I'll just highlight for the Court to look at on Page 14
11 of Appellate Exhibit 599, and Page 16 of Appellate Exhibit 599 --

12 MJ: Okay, let me get there.

13 CDC[MR COOMBS]: -- just a couple of the -- of the
14 government's statements. So ----

15 MJ: You said -- what exhibit? I have ----

16 CDC[MR COOMBS]: Appellate Exhibit 599.

17 MJ: Are you looking at their current ----

18 CDC[MR COOMBS]: No, Appellate Exhibit 599 ----

19 MJ: ---- their current response or the ----

20 CDC[MR COOMBS]: ---- is their 9 -- and I can ----

21 MJ: I thought I had Appellate Exhibit 58. Maybe I'm confused
22 again.

23 [Pause]

1 MJ: Mr. Coombs, are we looking at Appellate Exhibits 57 and 58?
2 CDC[MR COOMBS]: No, Your Honor. So, I'm handing the Court
3 Appellate Exhibit 599 [handing the document to the Military Judge].
4 And that was the government's response to the 917 motion.
5 MJ: Oh, the 917. Okay. Got it.
6 CDC[MR COOMBS]: So if the Court goes to Page 14 of Appellate
7 Exhibit 599. Right underneath (b)(1) where it says accused's acts
8 constitute theft of United States government records.
9 MJ: I'm sorry. Tell me where you are again.
10 CDC[MR COOMBS]: Right under the indented Number 1; accused's
11 acts constitute theft.
12 MJ: Okay.
13 CDC[MR COOMBS]: So you go in -- that first sentence there,
14 theft of records occurs when copies of the records are transmitted to
15 the unauthorized party even though the records remain in the custody
16 and control of the United States. Then if you go to the last
17 paragraph, that starts off in his chat logs, the government states,
18 in his chat log the accused admitted to exporting the data from the
19 United States government computer system onto his personal computer
20 and compromising the data by conveying it to Mr. Julian Assange. And
21 ma'am, if you turn to Page 16, at the very top, the -- right after
22 the cite, they start off with, conversion of computerized records as
23 a misuse or abuse of property, its use in a unauthorized manner

1 occurs when an accused transfers information to an unauthorized
2 party. Then they start the next paragraph; conveyance of the United
3 States government records to an unauthorized party constitutes
4 conversion under Section 641. In the middle of that same paragraph
5 they say here the accused converted the United States government
6 records by conveying them to WikiLeaks. WikiLeaks lacked the
7 authority to possess this information. And then they end that
8 paragraph; in the incident case, the accused stole and converted the
9 United States government records by transferring them to an
10 unauthorized party or onto his personal computer. Additionally, this
11 conveyance harmed the United States interest and exclusive possession
12 of the information in the records, thereby, further adding to the
13 conversion caused by the accused. They continue in the next
14 paragraph; furthermore, disclosure of the United States Government
15 proprietary information creates criminal liability for converting
16 that information, specifically, misappropriating the information
17 confidentially held by one party is giving it -- by giving it to an
18 unauthorized party constituted interference with the right to
19 exclusive use of the compromised information. And then they end that
20 on the very bottom of Page 16; thus, the accused substantially
21 interfered with the United States government information by
22 compromising it to WikiLeaks.

23 The -- the Court in its ruling in Appellate Exhibit 613

1 specifically held that the government provided further evidence that
2 the accused extracted and removed the classified records and
3 information therein from the SIPR computer in the 2d BCT SCIF,
4 downloaded them to his own personal digital media or platform,
5 removed the portable digital media and platform from the 2d Brigade
6 SCIF, transferred the records and information therein to his personal
7 portable digital media platform in his private housing unit, and then
8 transferred the records and information therein to WikiLeaks. The
9 Court finds that this to be some evidence of misuse of Government
10 records that could substantially -- seriously and substantially
11 interfere with the Government's property rights to control the
12 charged records and information therein to withstand a motion for a
13 finding of not guilty under R.C.M. 917. And then on the bottom of
14 that -- of the Court's ruling, on Page 7, the Court says, the
15 government's theory is that the accused knowingly converted the
16 records and information therein in Specifications 4, 6, 8 and 12 by
17 sending them to WikiLeaks.

18 The defense's position then is based upon what the
19 government represented to the Court for the 917, and then the Court's
20 findings based upon that, that here now clearly the 641 offenses and
21 the 793 offense -- the 641 offense and the 1030 offense rests on the
22 exact same conduct. And it's part of that ongoing conduct. Clearly
23 it would survive unreasonable multiplication of charges in findings

1 based upon different elements. But for sentencing this is the
2 *Campbell* case. This is -- in order to have given them to an
3 unauthorized individual you had to have taken them. So the defense's
4 position is that for each of the 641 offenses, they should merge
5 either with the 79 -- 793 offense, or with regards to the Category
6 II, the 641 should merge with the 1030(a)(1) offense.

7 MJ: So this is interesting because we have steal, purloin, or
8 knowingly convert. So the Government's really basically going
9 forward on two theories that he stole it, and then once it got on his
10 personal computer, the offense was complete in the conversion. So
11 you're really arguing to me it's the conversion piece that makes this
12 unreasonable multiplication of charges for sentencing?

13 CDC[MR COOMBS]: Yes, but then also slightly in a vacuum not
14 knowing for sure without the specific findings, if the Court found
15 that it was a -- what the government proved for the 641s was a
16 conversion, or if they proved a theft, and if so, when that theft
17 occurred. Was it when he actually did something that would violate
18 the exclusive possession of the property -- the government's interest
19 in exclusive possession, or when he took it to his CHU, as opposed to
20 keeping it in the SCIF? Or, as the Court asked initially, was it
21 when he downloaded it in the SCIF with -- with what the Court would
22 believe they found that, with the intent to permanently deprive or
23 temporarily deprive the Government.

1 So, yeah, it depends on when that theft occurred. But it's
2 clear the Government went on both of those theories and argued for
3 the 917 to avoid a finding of not guilty on the conveyance or
4 conversion theory. And -- and because of how they argued that then I
5 don't -- then here now, it's inconsistent to argue that those
6 shouldn't be merged for sentencing because they are part of an
7 ongoing course of action. And it is certainly one that you can --
8 you can separate for findings, but for sentencing this is the
9 *Campbell* case. And the defense would argue they should be merged.

10 MJ: Well, this -- how is this distinct from a case where you
11 have a BAH fraud; where you have false claims that are made, and then
12 you have subsequent larcenies as you're accepting the BAH month after
13 month after month. Does the defense see any distinction between
14 those kinds of cases or -- or not?

15 CDC[MR COOMBS]: The -- well, in that type case, if it's just
16 the false claims and then the larceny, I think those do get merged --
17 and that's kind of the *Campbell* case as well for sentencing. If --
18 if it's an ongoing larceny, then the issue is did the accused in that
19 case -- or appellant have to do something in order to continue to
20 receive because technically every time they get paid that extra BAH
21 or whatnot, that's a larceny. Here I would see a distinction in that
22 the taking -- the timing of the taking of the information, even under
23 the government's argument of maybe a few days difference or a month

1 difference, but the timing of the taking to the actual giving with
2 each of the offenses that my client's been found guilty of is a
3 matter of days usually. And -- and some of that's a byproduct of the
4 environment that he's in -- and others -- is just getting the
5 information in a place where he could give it, I guess. But it's
6 clear that's part of the ongoing intent. The intent to take that
7 information was to give that information. And the best example of
8 that is -- and I know we have a -- well, I don't know if the
9 government really argued that with regards to Specification 16, if
10 that was ever given, but everything that was charged was given. So
11 we don't have an example of information that was taken but then never
12 given. And so from the defense's position that would support the
13 fact that this is an ongoing course of action, that's one of the
14 initial steps to take it, but then it's always concluded with a
15 giving of the information.

16 MJ: All right.

17 CDC[MR COOMBS]: Then, ma'am, the final category is the
18 Category III offenses where defense argues the relevant 641
19 Specifications of 8, 12 and 16 should be combined with the
20 Specifications of Charge III that coincide with them. The government
21 concedes that Specification 16 of Charge II should be combined with
22 Specification 4 of Charge III for sentencing. They dispute whether
23 or not Specification 8 of Charge II should be combined -- combined

1 with Specification 2 of Charge III, and whether or not Specification
2 12 of Charge II should be combined Specification 3 of Charge III.
3 The defense's position is the obtaining of the -- the DABs in
4 Specification 8 or the cables -- the purported cables from the Net-
5 Centric Diplomacy database in Specification 12 were both accomplished
6 by using the Wget program of Specification 2 and 3, and, therefore,
7 those two offenses should combine because that was the means in which
8 to obtain the information. Again, part of the same logic under
9 Campbell of an ongoing course of action; this was just simply the
10 first step in that to obtain the information -- to use the program
11 that the Court found was an unauthorized program.

12 MJ: All right. Thank you.

13 CDC[MR COOMBS]: Thank you, Your Honor.

14 MJ: Government, will you go in the same approach ----

15 TC[MAJ FEIN]: Yes, ma'am.

16 MJ: ---- the same order as the defense counsel?

17 TC[MAJ FEIN]: If I may brief from counsel table.

18 MJ: Yes.

19 TC[MAJ FEIN]: So, first, Your Honor, it is the defense's motion
20 to merge Specifications 4 and 6 of Charge II for findings, the CIDNE-
21 I and CIDNE -- SIGACTs from CIDNE-I and CIDNE-A -- thefts of those.

22 First and foremost, Your Honor, there's a few
23 clarifications. There's no evidence, Your Honor, that -- that PFC

1 Manning -- in this court-martial, that PFC Manning burned on separate
2 CDs or on the same CD the SIGACTs before he removed them from the
3 SCIF. There's no evidence one way or the other. The only evidence
4 presented is when the information was likely downloaded, and that's
5 in Prosecution Exhibit 116; that is the Stipulated of Expected
6 Testimony or the testimony of Mr. Patrick Hoeffel, which gives the
7 dates of when the information would have been pulled from the CIDNE
8 databases, both Tampa, for the Afghanistan, and Iraq database. And
9 then it's the testimony that's summed up in the -- today's
10 stipulation of expected testimony of when it was found in the SD card
11 -- when it would have been created on his personal computer. But
12 there's no evidence of when it was physically removed; just a no
13 later than date, which is 30 January, and no earlier than date, which
14 is ----

15 MJ: Then does the government agree then the last written date,
16 I guess, basically doesn't make any difference because it could have
17 been last written anyway?

18 TC[MAJ FEIN]: It could be last written -- well, one of two
19 places, Your Honor, either on the personal Mac or on the SIPR
20 computer. But, yes, ma'am. The last written date doesn't tell you
21 anything else other than the last time the document was last edited -
22 - the two CS files. But the part, ma'am, that should not be lost
23 here is that these two thefts, although they're both thefts and they

1 are both SIGACT's from CIDNE databases, occurred in completely
2 separate manners using different databases and -- and over different
3 periods of time.

4 First, the Court's heard testimony that the CIDNE-A
5 database was downloaded from the Tampa server. PFC Manning had to
6 reach back to Tampa because he did not have physical access to the
7 one in Afghanistan.

8 MJ: Now that all assumes that I find that the intent steal was
9 present when these databases -- or these records were downloaded,
10 right?

11 TC[MAJ FEIN]: What that's -- that's correct, but it still goes
12 to how it was done and the timeframe. So even on the on the Charge
13 Sheet, it's a separate timeframe based off this evidence -- as it was
14 alleged. So first that evidence goes to Tampa, the CENTAUR log show
15 the only time that information was accessed, and then you have the
16 CIDNE-I database, which are a few days later. I'm sorry. I have
17 that reversed, Your Honor. But CIDNE-I was first, and then four days
18 later -- three and a half days later, CIDNE-Afghanistan. So
19 different times and information was finally pulled. And then, yes,
20 it was last written on one of the two computers at that time, and
21 then captured within that encrypted cabinet file.

22 Sort of jumping ahead, ma'am, but the United States does
23 agree that -- well, going to the next -- this would be Specifications

1 5 and 7 ----

2 MJ: Well, before we do that, in 5 and 7, you agreed that
3 they're -- they should be considered as one for sentencing.

4 TC[MAJ FEIN]: Yes, Ma'am.

5 MJ: And you don't agree with that with Specifications 4 and 6.

6 TC[MAJ FEIN]: Ma'am, the United States believes that these are
7 separate and distinct acts, because although they are focused on
8 transmission crimes versus a theft crime -- so the difference between
9 793 and 641, that both of these the start of the crime is the
10 unauthorized possession. That's when a 793 offense begin, although
11 it's focused on the transmission. So that's why the United States
12 argues for findings purposes, they're separate and distinct acts.
13 But for sentencing purposes they should merge because they, of
14 course, the gravamen of the offense is transmission, and there -- it
15 is not in dispute that they were transmitted at the same time.

16 MJ: Is the gravamen of the offense the transmission or the
17 transmission of particular pieces of classified information?

18 TC[MAJ FEIN]: Well, ma'am, it's transmission of particular --

19 MJ: National defense information.

20 TC[MAJ FEIN]: National defense information someone who's not
21 authorized to receive it, which is why for sentencing under --
22 purposes -- it seems it should merge because they were ultimately
23 received the time off it.

1 So, ma'am, then going to the UMC for sentencing. First and
2 foremost, ma'am, the United States continues with its argument from
3 before, as the Court's ruled in Appellate Exhibit 78, a theft crime
4 is just simply targeted to prevent thefts, transmission crimes to the
5 transmission, and the argument really hasn't changed there between
6 the 6 ----

7 MJ: That was the findings, right, though?

8 TC[MAJ FEIN]: It was for findings, ma'am. And the United
9 States would argue that that's no different for sentencing as well;
10 separate acts -- and the separate acts, Your Honor, that -- that are
11 focused on offenses that are serious in nature, each one
12 distinctively. The 641 offense is looking at entire -- well,
13 portions of a database -- the SIGACT databases, or the GTMO
14 databases, or the Net-Centric Diplomacy databases, and then it's
15 transmission of only particular documents from there -- the -- more
16 than the number for each of those. There's no question that for
17 sentencing purposes that PFC Manning could have retreated after the
18 theft; could have chosen not to do that. It goes back to
19 Specification 16. The government, only arguing, could say that he
20 intended to -- to -- although the government did argue that is MO was
21 intended to -- to transmit the GAL, but there's no evidence of that,
22 nor has the government presented that evidence. He could have
23 stopped, but chose not to, which is why it's not exaggerated for

1 sentencing that PFC Manning's criminal liability for sentencing
2 purposes be held greater. These are serious offenses, Your Honor.
3 Serious offenses he's been convicted of, and serious offenses for
4 sentencing as well.

5 MJ: Now in a unreasonable multiplication of charges analysis,
6 does the seriousness of the offense come into play?

7 TC[MAJ FEIN]: Well, ma'am, I think in -- in -- one moment,
8 please, ma'am.

9 [Pause]

10 TC[MAJ FEIN]: The seriousness, ma'am, really comes in play to -
11 - first, it's the second and third factors of the *Quiroz* factors as
12 applied by *Campbell*, so if it either misrepresents or exaggerates the
13 accused's misconduct, criminality -- excuse me, or if it unfairly
14 increases his punitive exposure. So when it is ultimately saying
15 seriousness, it's not unfairly creating more exposure for stealing a
16 significant portion of classified databases and then transmitting
17 some portion of those. And, ma'am, now specifically to the Charge
18 III offenses ----

19 MJ: The government said Specification -- Specification 4 would
20 be unreasonable multiplication of charges of Specification 16, what's
21 the difference between that and the other two?

22 TC[MAJ FEIN]: Well, ma'am, first and foremost, if I may first
23 talk about Specifications 2 and 3, it might help ----

1 MJ: Okay.

2 TC[MAJ FEIN]: ---- explain the difference, at least from the
3 government's eyes. First off, Your Honor, Specification 2 and 3 are
4 essentially the same except for completely different dates and the
5 act of introduction of Wget, again, onto the computer; an
6 introduction crime regulatory violation, do not introduce
7 unauthorized software. The reason that does not merge with the 1030
8 offense in Specification 12 is because the bypassing of security,
9 although in this case PFC Manning did use Wget, they are separate and
10 distinct acts. One is introduction similar to theft analysis and
11 transmission, the other is bypassing ----

12 MJ: Well, wasn't the introduction how he exceeded authorized
13 access?

14 TC[MAJ FEIN]: That's one of the different ways, ma'am. The
15 United States presented multiple theories of -- of how authorized
16 access was exceeded. But Wget allowed him to go onto the actual
17 state server and go around the web page. So, yes. But, ma'am, for -
18 - so then, moving to ----

19 ATC[CPT MORROW]: Actually, sorry, if I could interrupt Major
20 Fein here.

21 MJ: Yes.

22 ATC[CPT MORROW]: Specification 12 is the 641 offense, Your
23 Honor. And so what Spec 3 of Charge III is aimed at is the

1 introduction of Wget that second time in May -- on May 4th, which was
2 the -- which the evidence shows that that was the download of the
3 last approximately 11,000 cables. Spec 12 is the use of Wget in that
4 timeframe -- for that offense was Wget that was already on his
5 computer prior to May the 4th. Does that make sense, Your Honor?

6 MJ: I'm not sure.

7 ATC[CPT MORROW]: He -- okay. The evidence shows he
8 reintroduced Wget on May 4th, and that was for the last essentially
9 11,000 Department of State cables from March 1st and onward. The
10 250,000 number relates to the purported cables that were released in
11 the public domain that go through February 28th, 2010. So everything
12 prior to February 28th, 2010, can go forward. And so the use of Wget
13 was -- was to steal those cables -- those 250,000 cables was the Wget
14 file that was on the computer prior to May 4th. Does that make
15 sense, ma'am?

16 MJ: Yeah. So he reintroduced it?

17 ATC[CPT MORROW]: Yes. He reintroduced it on May 4th, stole
18 another 11,000 cables. And those cables were ultimately in a file
19 that was corrupted and not ultimately released in the public domain.

20 MJ: All right. Is there anything else with respect to this
21 issue?

22 CDC[MR COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, Ma'am.

1 MJ: All right. We have two options; Option A is we can
2 reconvene later on this afternoon and I'll have a ruling for you.
3 I'm looking probably around 1700. Or, Option B, we can announce the
4 ruling tomorrow morning.

5 CDC[MR COOMBS]: Option B would be fine with the defense,
6 Your Honor.

7 TC[MAJ FEIN]: We support that option as well, ma'am.

8 MJ: All right. The other issue is the objections from the
9 defense on today's testimony and the government response to those.
10 I'd like to have no more than a day turn around on these issues
11 because we're going to have them on a rolling basis. Can you have
12 them to me -- say 1800-ish, and you have your response back at 2000?

13 TC[MAJ FEIN]: If we get them, yes, ma'am.

14 CDC[MR COOMBS]: Yes, we can, ma'am. And we did object at
15 each of those points, so it won't be hard for us to put that
16 together. So I can actually probably get it earlier. Once I leave
17 here I'll type it up and get it to the government. But definitely by
18 1800.

19 MJ: Okay. Then you can have government your response -- again,
20 I don't want any long legal briefs and analysis. Just here's the
21 objection and here's basically the category of objection that I'm
22 doing. Okay?

23 CDC[MR COOMBS]: Yes, Your Honor.

1 MJ: So what time do you want to start tomorrow?

2 TC[MAJ FEIN]: I'm sorry, ma'am, real quick. I thought

3 previously in your instructions that the portion you've read from

4 your findings -- your ruling, that you were going to develop those

5 categories. So you want us to pin it, or do you want us to ----

6 MJ: I'm not developing categories.

7 TC[MAJ FEIN]: Oh, okay, ma'am.

8 MJ: I didn't say that. No, all I said was, you've outlined --

9 we have had the defense motion ready. You -- and you both weighed in

10 on how you think the case law applies. So I don't need long legal

11 analysis. I think the case law is -- is set. It's just a matter of

12 where the facts fit. So I'm really looking at what are you saying

13 factually and why do you say that, and why you're objecting to it.

14 And then, government, if you believe that the facts support

15 admissibility under R.C.M. 1001(b)(4), let me know what those facts

16 are. Like I said, I don't need a long dissertation on the law;

17 you've both given it to me.

18 TC[MAJ FEIN]: Yes, ma'am.

19 CDC[MR COOMBS]: Yes, Your Honor.

20 MJ: What time tomorrow?

21 TC[MAJ FEIN]: May we have a moment, Your Honor?

22 MJ: Yes.

23 [Pause]

1 CDC[MR COOMBS]: 10 o'clock, ma'am.
2 MJ: Ten o'clock?
3 TC[MAJ FEIN]: Yes, ma'am.
4 MJ: All right. Court is in recess then until 10 o'clock
5 tomorrow morning.
6 [The court-martial recessed at 1518, 5 August 2013.]
7 [END OF PAGE]

1 [The court-martial was called to order at 1001, 6 August 2013.]

2 MJ: Court is called to order. Major Fein, please account for
3 the parties.

4 TC[MAJ FEIN]: Yes, ma'am, all parties when the court last
5 recessed are again present with the addition of Captain Overgaard.

6 MJ: All right, have we had any new appellate exhibits added to
7 the list.

8 TC[MAJ FEIN]: Yes, ma'am, there are a few. First, Your Honor,
9 Appellate Exhibit 636 is the defense specific objection under R.C.M.
10 1001(b)(4) for the testimony of Under Secretary of State for
11 Management Patrick Kennedy, dated 5 August 2013. What's been marked
12 as Appellate Exhibit 637 is the government's response to the
13 defense's objection to the R.C.M. 1001(b)(4) objection for Under
14 Secretary of State for Management Patrick Kennedy, dated 5 August
15 2013. What has been marked as Appellate Exhibit 638 is the defense
16 witness -- witness order list for sentencing, dated today, 6 August
17 2013.

18 Also, Your Honor, as of 9:54 this morning there are seven
19 members of the media at the media operations center, there is one
20 stenographer, there are no media in the courtroom, and five
21 spectators in the courtroom. Additionally, Your Honor, at the
22 present time the overflow trailer is not available based on the
23 generator issue, but that is being fixed, but with only five

1 spectators in the courtroom there's enough space.

2 MJ: Once again, before we begin, the parties and I held an
3 R.C.M. 802 conference before coming on the record today, that's a
4 conference where the parties and I discuss scheduling and other
5 logistics in the case. And Mr. Coombs gave me the defense witness
6 list, and also advised that for OCONUS witnesses, you don't have any
7 objections if they're telephonically, is that correct?

8 CDC[MR. COOMBS]: That is correct, Your Honor.

9 MJ: And, I assume the parties are coordinating to make sure any
10 such telephonic testimony is coordinated and ready to go at the
11 appropriate time?

12 TC[MAJ FEIN]: Yes, ma'am. Today the United States is going to
13 be reaching out to all the witnesses to get the most updated status
14 and start-up the movement, and we'll confirm who's OCONUS, who's not,
15 and who will be available -- won't be -- and have them set that up.

16 MJ: And, just again, a reminder to the government, I had asked
17 the government a couple of days ago just to ensure that they look at
18 the redacted M.R.E. 505(g) filings to ensure that the government has
19 assured the Court that they will not use anything that was redacted
20 in any of those filings in your sentencing case or in their case at
21 all.

22 TC[MAJ FEIN]: Yes, ma'am. That's an ongoing process, and the
23 United States intends to have it completed Friday with the last

1 witness to confirm that all the witnesses the government elicited
2 testimony to comply or comport with those filings.

3 MJ: Is there anything else we need to address before the court
4 reads the two rulings I have ready to go. One of them is the defense
5 motion to merge charges of unreasonable multiplication of charges for
6 findings and sentence. And the other is the defense motion for
7 appropriate relief under R.C.M. 1001(b)(4). That ruling is dated
8 yesterday, not today, because yesterday I gave the procedures for
9 filings in the future. And I want to make sure the date is correct
10 because you basically will be following them today. Is there
11 anything else we need to address?

12 CDC[MR. COOMBS]: No, Your Honor.

13 TC[MAJ FEIN]: No, ma'am.

14 MJ: Ruling: Defense Motion to Merge Charges as Unreasonable
15 Multiplication of Charges for Findings and Sentence:

16 On 30 July 2013, the Defense filed three motions to merge
17 specifications for unreasonable multiplication of charges (UMC) for
18 findings and sentence(Appellate Exhibit 626 through628) seeking the
19 following relief:

20 1. Merge Specifications 4 and 6 of Charge II for findings
21 because the stealing, purloining, or knowing conversion (SPKC)of both
22 the CIDNE-A CIDNE-I databases were one transaction.

1 Merge Specifications 5 and 7 of Charge II for findings
2 because the accused communicated the CIDNE-I, CIDNE-Iraq and CIDNE-A,
3 CIDNE-Afghanistan databases as one transaction.

4 3. Merge the following categories of specifications for
5 sentencing:

6 a. Article 134 (18 U.S.C. Section 641) with Article 134
7 (18 United States Code, Section 793(e)) and Article 134 (18 United
8 States Code, Section 1030(a)(1)) offenses as the SPKC and
9 communication involve the same databases:

10 (1) Specifications 4 and 5 of Charge II: the CIDNE-I
11 database containing more than 380,000 records belong to the United
12 States government and Specifications 6 and 7 of Charge II: the
13 CIDNE-A database containing more than 90,000 records belonging to the
14 United States government;

15 (2) Specifications 8 and 9 of Charge II: the United States
16 Southern Command database containing more than 700 records belonging
17 to the United States Government;

18 (3) Specifications 12 and 13 of Charge II the Department of
19 State Net-Centric Diplomacy (NCD) database containing more than
20 250,000 records belonging to the United States Government; and

21 b. Article 134 (18 United States Code, Section 641; and 18
22 United States Code, Section 1030(a)(1)) and Article 92:

1 (1) Specification 8 of Charge II the United States
2 Southern Command database and Specification 2 of Charge III involving
3 a violation of a lawful general regulation by adding unauthorized
4 software to a Secret Internet Protocol Router Network computer;

5 (2) Specification 12 of Charge II: the Department of State
6 Net-Centric Diplomacy database and Specification 3 of Charge III
7 involving a violation of a lawful general regulation by adding
8 unauthorized software to a Secret Internet Protocol Router Network
9 computer;

10 (3) Specification 16 of Charge II involving a portion of
11 the United States Forces-Iraq Microsoft Outlook/Sharepoint Exchange
12 Server Global Address List belonging to the United States government
13 and Specification 4 of Charge III involving a violation of a lawful
14 general regulation by using an information system in a manner other
15 than its intended purpose.

16 Just for the record, I do notice a typo in here that I will
17 correct. This category (b) does not involve 18 United States Code,
18 Section 1030(a)(1) offenses.

19 On 1 August 2013, the Government filed a response to each
20 of the three defense motions (Appellate Exhibits 632 to 634) opposing
21 the Defense motions except for the Motion to consider specifications
22 5 and 7 of Charge II as Unreasonable Multiplication of Charges for

1 sentencing and Specification 4 of Charge III as UMC for sentencing
2 with Specification 16 of Charge II

3 The Law

4 1. The military recognizes the concepts of UMC for
5 findings and UMC for sentencing. Nonexclusive factors considered by
6 the court in determining whether offenses area UMC for findings or
7 sentence include whether: (1) each charge and specification is aimed
8 at distinctly separate criminal acts; (2) the number of charges and
9 specifications misrepresent or exaggerate the accused's criminality;
10 (3) the number of charges and specifications unreasonably increases
11 the accused's punitive exposure; and (4) there is any evidence of
12 prosecutorial overreaching or abuse in the drafting of charges,
13 *United States versus Quiroz*, 55 M.J. 334 (Court of Appeals for the
14 Armed Forces, 2001)

15 2. Charges that are not a UMC for findings may be UMC for
16 sentencing where the nature of the harm requires a remedy that
17 focuses more appropriately on punishment, *United States versus*
18 *Campbell*, 71 M.J. 19 (Court of Appeals for the Armed Forces, 2012)

19 3. Successive withdrawals off funds from different
20 accounts through stolen automatic teller machine cards are separate
21 offenses even if the withdrawals occurred at substantially the same
22 time and place, *United States versus Aquino*, 20 M.J. 712 (Army Court

of Military Review, 1985); see also *United States versus Kulathungam*,
1999 West Law 35021445 (Army Court of Criminal Appeals, 1999)

Conclusions of Law

UMC for findings-merge Specifications 4 and 6 of Charge II
and Specifications 5 and 7 of Charge II.

1. Specifications 4 and 6 of Charge II. PFC Manning had
the specific intent to deprive the Government of the use and benefit
of the records at the time he extracted the CIDNE-I SIGACTs on or
about 3 January 2010. PFC Manning had the specific intent to deprive
the Government of the use and benefit of the records at the time he
extracted the CIDNE-A SIGACTs, on or about 7 January 2010. The Court
does not find that PFC Manning stole and purloined the CIDNE-I and
CIDNE-A SIGACTs on the same day. Even if the Court did find that the
stealing and purloining of the CIDNE-I and CIDNE-A SIGACTs occurred
on the same day, the logic of *Aquino* and *Kulathungam* is persuasive.
As in these cases, PFC Manning had to access separate databases to
extract the CIDNE-I and CODNE-A SIGACTs. These were successive
access/extractions that constitute separate and distinct 18 United
States Code, Section 641/Article 134 offenses for findings under the
first *Quiroz* factor. The charges do not misrepresent or exaggerate
PFC Manning's criminality or unreasonably increase his punitive
exposure. There is no evidence of prosecutorial overreaching.

1 The Defense motion to merge Specifications 4 and 6 of Charge II for
2 findings is denied.

3 Specifications 5 and 7 of Charge II.

4 (a) The parties agree that PFC Manning transmitted the
5 CIDNE-1 and CIDNE-A records on the same day. The gravamen of the 18
6 United States Code, Section 793(e)/Article 134 offenses in
7 Specifications 5 and 7 of Charge II, is the willful transmission of
8 national defense information to a person not authorized to receive
9 it. Specification 5 of Charge II charges the willful transmission of
10 the portion of CIDNE-I database containing more than 380,000 records
11 belong to the United States government. Specification 7 of Charge II
12 charges the willful transmission of the portion of the CIDNE-A
13 database containing more than 90,000 records belonging to the United
14 States Government. These are separate matters of national defense
15 information. The transmission of each constitutes a violation of 18
16 United States Code, Section 793(e)/Article 134, UCMJ under the first
17 Quiroz factor. The fact that the transmissions may have occurred at
18 the same time or simultaneously is irrelevant for unreasonable
19 multiplication of findings analysis. Charging the volume of national
20 defense information transmitted from both the CIDNE-I and CIDNE-A
21 databases in two separate specifications does not misrepresent or
22 exaggerate PFC Manning's criminality or unreasonably increase his
23 punitive exposure. The prosecution has not over-reached in charging

1 PFC Manning as it has in Specifications 5 and 7 of Charge II.
2 Considering all of the *Quiroz* factors, the Court does not find
3 Specifications 5 and 7 of Charge II a UMC for findings. The Defense
4 motion to merge these offenses for findings is denied.

5 (b) The Government does not object to the Court treating
6 these offenses as one for sentencing. As such, the Court will treat
7 Specifications 5 and 7 as a UMC for sentencing.

8 UMC for sentencing-merge Specifications 4, 5, 6, and 7 of
9 Charge II, Specifications 8 and 9 of Charge II, Specifications 12 and
10 13 of Charge II, and Specifications 2, 3, and 4 of Charge III, with
11 Specifications 8, 12, and 16 of Charge II respectively.

12 The *Quiroz* factors apply differently to determining whether
13 there is a UMC for findings and for sentencing.

14 (a) The Government concedes that Specification 4 of Charge
15 III is UMC for sentencing with Specification 16 of Charge II. In
16 this case, PFC Manning committed the Article 92 violations in
17 Specifications 2 and 3 of Charge III as part of a connected chain of
18 events involving the SPKC offenses in Specifications 8 and 12 of
19 Charge II, respectively. For sentencing purpose, the Court applied
20 the *Quiroz* factors and finds each pair of specifications
21 (Specification 2 of Charge III/Specification 8 of Charge II;
22 Specification 3 of Charge III/Specification 12 of Charge II;
23 Specification 4 of Charge III/Specification 16 of Charge II) a UMC

1 for sentencing. So, all three of the 92 violations are unreasonable
2 multiplication of charges for all three of the 641 violations, even
3 though I didn't say that very articulately.

4 (b) With respect to United States Code, Section
5 641/Article 134 offenses in Specifications 4, 6, 8, and 12 of Charge
6 II and the 18 United States Code, Section 793(e)/Article 134 offenses
7 in Specifications 5, 7, and 9 of Charge II and the 18 United States
8 Code, Section 1030(a)(1)/Article 134 offense in Specification 13 of
9 Charge II, the Court finds that the 18 United States Code, Section
10 793(e)/Article 134 and the 18 United States Code, Section
11 1030(a)(1)/Article 134 transmission offense involve the same or a
12 subset of the records that formed the *res* of the 18 United States
13 Code, Section 641/Article 134 SPKC offenses. The Court ruled in
14 Appellate Exhibit 78 that these specifications were not an
15 unreasonable multiplication of charges for findings. Under the
16 unique facts of this case, the Court applies the *Quiroz* factors and
17 finds that punishing Specifications 4, 6, 8, and 12 of Charge II
18 separately from Specifications 5, 7, 9, and 13, respectively, of
19 Charge II unreasonably increases PFC Manning's punitive exposure. As
20 such, the Court will treat each pair of specifications, 4 and 5 of
21 Charge II; 6 and 7 of Charge II, 8 and 9 of Charge II, and 12 and 13
22 of Charge II as one for sentencing purposes. These offenses are not

1 a UMC for findings, thus merger of the offenses is not appropriate.

2 Each specification remains as a stand-alone offense for findings.

3 (c) The Government concedes that Specifications 5 and 7 of
4 Charge II are UMC for sentencing, however, applying the *Quiros*
5 factors, the Court finds that Specifications 4 and 6 of Charge II are
6 aimed at distinctly separate criminal acts and the Government has not
7 over-reached or exaggerated PFC Manning's criminality or unfairly
8 increased his punitive exposure. Specifications 4 and 6 of Charge II
9 are not a UMC for sentencing. Specifications 5 and 7 of Charge II
10 are UMC for sentencing with Specifications 4 and 6 of Charge II,
11 respectively. The resulting 20-year maximum sentence for all four
12 specifications does not exaggerate the accused's punitive sentencing
13 exposure.

14 Ruling:

15 The Court Motion -- The Defense Motions to Merge
16 Specifications for Unreasonable Multiplication of Charges for
17 findings and sentence is GRANTED INPART. The Court will treat the
18 following pairs of specifications as one each for sentencing
19 purposes:

20 1. Specification 2 of Charge III with Specification 8 of
21 Charge II;

22 Specification 3 of Charge III with Specification 12 of
23 Charge II;

1 Specification 4 of Charge III with Specification 16 of
2 Charge II;

3 (4) Specification 4 of Charge II with Specification 5 of
4 Charge II;

5 5. Specification 6 of Charge II with Specification 7 of
6 Charge II;

7 6. Specification 8 of Charge II with Specification 9 of
8 Charge II;

9 7. Specification 12 of Charge II with Specification 13 of
10 Charge II.

11 The Court's ruling reduces the maximum confinement that
12 may be imposed from 136 years to 90 years.

13 And the Court asked the parties to verify the Court's math,
14 but that is what I concluded.

15 CDC[MR. COOMBS]: The defense concurs, Your Honor.

16 TC[MAJ FEIN]: Yes, ma'am.

17 MJ: And that will be added as the next appellate exhibit in
18 line. I will give it to the court reporter now and retrieve it later
19 to correct the typo.

20 [The document was marked Appellate Exhibit 640.]

21 MJ: All right. Ruling for the Defense Motion for Appropriate
22 Relief under R.C.M. 1001(b)(4).

1 On 31 July 2013, the Defense filed a motion to limit the
2 Government's aggravation evidence to its proper scope under R.C.M.
3 1001(b) (4) (Appellate Exhibit 629). Specifically, the Defense objects
4 to three categories of Government Sentencing evidence:

5 1. Chain of Events Testimony not directly related to the
6 accused's charged misconduct;

7 2. "Could" Cause Damage Testimony; and

8 3. Monetary Expenses and Use of Resources Testimony

9 On 2 August 2013, the Government filed a response in
10 opposition (Appellate Exhibit 630).

11 The Law:

12 1. The Government may present evidence as to any
13 aggravating circumstance directly related to or resulting from the
14 offenses of which the accused has been found guilty. Evidence in
15 aggravation includes, but is not limited to, evidence of financial,
16 social, psychological, and medical impact on or cost to any person or
17 entity who was the victim of an offense committed by the accused and
18 evidence of significant adverse impact on the mission, discipline, or
19 efficiency of the command directly and immediately resulting from the
20 accused's offense -- offenses. R.C.M. 1001(b) (4) -- I'm sorry (d) (2)
21 in relevant part.

22 2. The standard for admission of aggravating evidence
23 under R.C.M. 1001(b) (4) -- Am I looking at (2) or (4)? (b) (4),

excuse me, is higher than relevance. The standard for admission of aggravating evidence under R.C.M. 1001(b)(4) is higher than relevance. The offenses committed by the accused must have contributed to the effects that the Government proposes as aggravation. The accused's offenses must play a material role in bringing about the effects. The aggravation evidence is not admissible if an independent, intervening event played the only important part in bringing about the effect. An accused is not responsible for a never ending chain of causes and effects. *United States versus Rust*, 41 M.J. 472 at 478 (Court of Appeals for the Armed Forces 1995).

3. If the Court decides that evidence is proper aggravation evidence under R.C.M. 1001(b)(4), the Court then determines whether the probative value of the aggravation evidence is substantially outweighed by the danger of unfair prejudice under M.R.E. 403, *United States versus Martin*, 20 M.J. 227 (Court of Appeals for the Armed Forces 1985).

4. The administrative burden of investigating or prosecuting the accused or the burden of the court-martial process on the unit or the military is not admissible aggravating evidence under R.C.M. 1001(b)(4) 60 MJ 795, *United States versus Stapp*, 60 M.J. 795, (Army Court of Criminal Appeals, 2004), affirmed 64 M.J. 179 (Court of Appeals for the Armed Forces, 2006).

Conclusions of Law Generally:

1 1. Determinations of whether evidence offered in
2 aggravation is directly related to or resulting from the offenses of
3 which the accused has been found guilty and whether aggravation
4 evidence of significant adverse impact on the mission, discipline, or
5 efficiency of the command is a direct and immediate result from the
6 accused's offenses are fact specific inquiries. The nature of the
7 offenses that the accused has been convicted of and the amount of
8 time necessary for aggravating circumstances relating directly to or
9 resulting from his offenses to manifest themselves are appropriate
10 considerations for these inquiries.

11 2. R.C.M. 1001(b) (4) sets forth examples of permissible
12 aggravating evidence. In this case aggravating evidence may include
13 adverse impact to the United States government and any United States
14 agency or mission that has been directly affected by the accused's
15 offenses or by WikiLeaks disclosures of the information communicated
16 to them by the accused.

17 3. Risk of damage or harm to the national security of the
18 United States and any United States agency or mission that directly
19 relates to or results from the accused's offenses or WikiLeaks
20 disclosures of the information communicated by the accused is proper
21 aggravation evidence under R.C.M. 1001(b) (4).

22 Monetary Expense and Use of Resources Testimony:

1 1. Steps taken by the United States government, and
2 agencies therein, to mitigate potential damage caused by public
3 dissemination of information given to WikiLeaks by the accused is
4 proper aggravation. The resources and costs associated with taking
5 these mitigation steps is directly related to the accused's offenses
6 and is admissible aggravation evidence under R.C.M. 1004(b)(4).

7 2. The Court has received aggravation evidence involving
8 the Information Review Task Force (IRTF) and the Department of State
9 Persons at Risk working group. The IRTF was established via the 5
10 August 2010, order by then Secretary of Defense, Robert Gates (AE
11 631). All of the bulleted taskings in the order involve assessing
12 damage caused by the accused's offenses. This is not evidence
13 related to investigating the accused's misconduct or the
14 administrative burden of the court-martial process. The IRTF was
15 established to assess damage to the United States and is independent
16 of any decision to investigate or prosecute the accused. Similarly,
17 the Department of State Persons at Risk working group was formed to
18 determine whether there were identifiable persons at risk of violence
19 committed against them or incarceration based on the WikiLeaks
20 disclosures of purported Department of State cables provided to them
21 by the accused. This group had nothing to do with the investigation
22 or prosecution of the accused.

3. Testimony received from Brigadier General (Retired) Carr and Mr. Kirchhofer regarding the creation of the IRTF, its mission and resourcing, and how it functioned is proper aggravation evidence under R.C.M. 1001(b)(4). The testimony received from Ambassador Kozak regarding the creation of the Department of State Persons at Risk working group, its mission and resourcing, and how it functioned is also proper aggravation evidence.

Chain of Events Testimony"

1. The Court agrees that there comes a point at which there have been so many additional intervening events or links in the chain between the accused's offenses and the ensuing risk or harm that the ensuing risk or harm is no longer directly related to or a direct result of the accused's offenses, *United States versus Rust*, 41 M.J. 472 at 478 (Court of Appeals for the Armed Forces, 1995). However, the fact that there has been an intervening event or decision does not automatically absolve the accused from responsibility if his offenses played a material role in creating the risk of damage or harm or contributed in causing the ensuing risk or harm, *United States versus Lawson*, 33 M.J.946 at 959 and 960 (Navy Marine, Court of Appeals, 1991), affirmed, 36 M.J. 414, (Court of Appeals for the Armed Forces 1993). Whether intervening events played the only important role in causing a risk or harm is a case specific factual determination.

1 2. Both the IRTF and the DOS Persons at Risk group were
2 created to assess what damage occurred from the accused's offenses
3 and what mitigation measures were necessary to address that damage.
4 The testimony by Brigadier [sic](Retired) Carr, Mr. Kirchhofer, and
5 Ambassador Kozak regarding the findings of the IRTF and the
6 Department of States Persons at Risk group and the steps taken by
7 these entities to mitigate the risk of damage and actual damage
8 identified in the findings is a direct result of the accused's
9 offenses and is proper aggravation evidence. The decision by
10 Secretary Gates to establish the IRTF and any similar decision made
11 by Department of State to establish the Persons at Risk group were
12 not intervening causes that changed the resulting risk of damage or
13 actual damage caused by the accused's misconduct

14 3. The Court considered the testimony in closed session
15 given by Principle Deputy Assistant Secretaries (PDAS) Dibble and
16 Feeley. The Court finds that their testimony provided concrete
17 examples of harm caused as a direct result of the accused's offenses
18 that occurred shortly after the publication of particular purported
19 cables released by WikiLeaks. The decisions made by foreign
20 officials in the aftermath of publication did not constitute an
21 intervening cause that played the only important role in causing the
22 harm. The actions of the accused leading to the disclosures by
23 WikiLeaks directly resulted in the decisions made by the foreign

1 officials as set forth in the testimony. The testimony of PDAS
2 Dibble and PDAS Feeley is proper aggravation under R.C.M. 1001(b)(4)
3 4. Ms. Swart's testimony centered around the evolution of
4 the DOS Net-Centric Diplomacy (NCD) Database and the impact of the
5 accused's misconduct on interagency access to NCD. The Court finds
6 her testimony involves impact directly resulting from the accused's
7 misconduct. It is admissible aggravation evidence under R.C.M.
8 1001(b)(4).

9 Could Cause Damage Testimony

10 1. This is really the same thing as risk of damage or
11 harm to the United States which the Court finds is admissible
12 aggravation evidence provided the risk of damage or harm directly
13 relates to or results from the accused's offenses. This determination
14 is also a fact specific determination for each witness or exhibit
15 proffered by the Government.

16 2. Brigadier General (Retired) Carr and Mr. Kirchhofer's
17 testimony regarding the IRTF's resourcing, missions, and operations
18 is proper aggravation evidence under R.C.M. 1001(b)(4).

19 3. Brigadier General (Retired) Carr's testimony regarding
20 how the IRTF identified a need to warn families of Soldiers with
21 medical data that the information might be released by WikiLeaks is
22 proper aggravation evidence, however, the Court will disregard his
23 speculation that families may have to relive tragic events if the

1 information was released. The Court will also disregard Brigadier
2 General (Retired) Carr's testimony regarding the Taliban killing.

3 4. Brigadier General (Retired) Carr's testified that
4 WikiLeaks' publication of over 90,000 CIDNE-A SIGACTs and over
5 380,000 CIDNE-I SIGACTs given to WikiLeaks by the accused disclosed
6 TTPs, human sources, and other information that, taken collectively,
7 reveal show the United States conducts operations and shows what
8 information the United States know or didn't know at the time. These
9 risks to national security caused by disclosure of information given
10 to WikiLeaks by the accused is proper aggravation evidence because it
11 is evidence of risk created as a direct result of the accused's
12 offenses.

13 5. Brigadier General (Retired) Carr's expert testimony
14 regarding degradation in information sharing with the United States
15 and between the United States and foreign partners and coalition
16 forces is proper aggravation evidence because the degradation in
17 information sharing was a direct result of the accused's offenses.

18 6. Ambassador Kozak was properly qualified as an expert in
19 United States efforts to foster democracy abroad and human rights
20 concerns. He opined that the accused's offenses caused, and will
21 continue to cause, a chilling effect on people making them afraid to
22 come forward and foster democracy abroad and human rights concerns is

1 speculative and inadmissible aggravation evidence. The Court will
2 disregard it.

3 Military Rule of Evidence 403 analysis:

4 Brigadier General (Retired) Carr, Mr. Kirchhofer, Ms.
5 Dibble, Mr. Feeley, Ms. Swart and Ambassador Kozak were properly
6 accepted as experts. The probative value of their testimony is not
7 substantially outweighed by the danger of prejudice under M.R.E. 403.
8 This is a judge alone trial the Court will confine its consideration
9 of any hearsay admitted through these witnesses to its proper purpose
10 of evaluating the expert's opinion in accordance with M.R.E. 703.

11 Conclusions of Law - Procedure Forwards:

12 I read those yesterday so I don't intend to repeat that.
13 And we are now following the procedure where after each witness
14 testified, during the course of the testimony the defense will lodge
15 their objections. Afterwards, the defense will give the Court
16 particularized objections. The government will then let the Court
17 know their position, and will come out with a ruling witness by
18 witness, testimony by testimony. Is there anything else we need to
19 address with either of these two motions?

20 CDC[MR. COOMBS]: No, Your Honor.

21 TC[MAJ FEIN]: No, ma'am.

22 MJ: All right, do we need a recess before we call the witness
23 or are we ready to go?

1 TC[MAJ FEIN]: We're ready, ma'am.

2 ATC[CPT MORROW]: The United States calls Major General Michael
3 Nagata.

4 MAJOR GENERAL MICHAEL NAGATA, U.S. Army, was called as a witness for
5 the prosecution, was sworn, and testified as follows:

6 DIRECT EXAMINATION

7 Questions by the assistant trial counsel [CPT MORROW]:

8 Q. Sir, you are Major General Michael Nagata, Commander,
9 United States Special Operations Command Central, MacDill Air Force
10 Base, Florida?

11 A. That's correct.

12 Q. And, sir, when did you assume command of, I'm going to say
13 U.S. SOCCENT?

14 A. I took command approximately five weeks ago.

15 Q. So June 2013?

16 A. That's correct.

17 Q. And, sir, describe your duties as the Commander?

18 A. As the Commander of SOCCENT, I command the special
19 operations forces assigned to U.S. Central Command, and I am
20 responsible to the Commander of SOCCENT for conducting special
21 operations activities that support his campaign goals and objectives.

22 Q. And does that include all the services, sir?

23 A. It does. It is a joint command, so I have representatives

1 from all the services.

2

3

4 Q. And, sir, if you would just briefly describe the region of
5 Central Command?

6 A. Central Command encompasses countries that range from the
7 Middle East, to the Central Asian states, to what we generally refer
8 to as South Asia, including Pakistan.

9 Q. And, sir, where were you assigned prior to taking command
10 of U.S. SOCCENT?

11 A. Prior to my command tenure now, I spent approximately 18
12 months as an officer on the Joint Staff in the Pentagon.

13 Q. And, sir, what were you doing on the Joint Staff? What was
14 your portfolio so to speak?

15 A. I was a member of the J-3 operations directorate of the
16 Joint Staff. In that capacity, I was a deputy director within the
17 operations directorate. My specific function was entitled the deputy
18 director for special operations and counterterrorism.

19 Q. And, sir, who did -- I assume you provided advice to the J-
20 3, who else were you providing advice to in that capacity?

21 A. In that capacity, I provided my military advice about two
22 subjects; special operations and counterterrorism, to the J-3 of the
23 Joint Staff, the vice chairman, and the chairman -- of the Chairman

1 of the Joint Staff.

2 Q. And, sir, in that position what were your day-to-day
3 responsibilities generally?

4 A. My day-to-day responsibilities generally involve two
5 functions. One, as I just referenced, was providing my best military
6 advice to those three senior officials. I also worked on a day-to-
7 day matter on all plans, policies, directives, and orders that
8 affected or that were connected with the employment of special
9 operations and counterterrorist capabilities in the department.

10 Q. Sir, in layman's terms, what is the difference between
11 special operations and general purpose force operations?

12 A. Special operations forces are drawn from all the services
13 of the United States military. And they are specifically trained,
14 organized and equipped to conduct specific missions that are
15 associated with the legislation that created U.S. Special Operations
16 Command in the late 1980s. These are a mission such as
17 counterterrorism, foreign internal defense, unconventional warfare,
18 special recognizance. As a general rule these involve small
19 elements, small teams, with unique military capabilities that
20 sometimes operate behind enemy lines, almost always operate in high
21 risk areas for the purposes of achieving military goals.

22 Q. And, sir, if you would just describe what you mean by
23 foreign internal defense and special operations forces roles in that?

1 A. Foreign internal defense is not exclusively the domain of
2 special operations forces, but it is something that special
3 operations forces conduct around the world in order to facilitate the
4 creation of improved military capabilities and capacity within those
5 nations that are allies or partners of the United States.

6 Q. And, sir, prior to assuming your position on the Joint
7 Staff, where were you assigned?

8 A. Prior to reporting to the Joint Staff, I was in the country
9 of Pakistan. I was the Deputy Chief or Deputy Commander of the
10 Office of the Defense Representative to Pakistan.

11 Q. And how long were you in that position, sir?

12 A. I was in that position for 26 months.

13 Q. July 2009 to September 2011, approximately?

14 A. That is correct.

15 Q. And, sir, I'm going to use the acronym ODRP from here on
16 out to refer to the Office of Defense Representative Pakistan. Is
17 that okay?

18 A. Yes.

19 Q. Sir, are you here today to discuss your observations and
20 experiences while assigned as the Deputy Chief for Operations ODRP
21 Pakistan from 2009 to 2011?

22 A. I am.

23 Q. And, sir, before we discuss that specific topic, sir, I'd

1 like to just talk briefly about your career. When did you join the
2 Army?

3 A. I joined the Army in 1981.

4 Q. And you were initially enlisted, sir?

5 A. I was.

6 Q. And when were you commissioned?

7 A. I was commissioned in 1982.

8 Q. What was your branch?

9 A. I was infantry officer initially.

10 Q. And I assume you received the standard training for an
11 infantry officer?

12 A. I did, indeed.

13 Q. And, sir, when did you switch over to the Special Forces
14 community?

15 A. I volunteered for and attended the Army's Special Forces
16 Qualification course in 1984. And I've remained in the special
17 operations field since that time.

18 Q. And, sir, if you would, can you just describe generally
19 sort of the types of jobs you've had in the Special Forces field or
20 community?

21 A. Certainly. I have spent a great deal of my career,
22 subsequent to 1984, in special forces -- Army special forces units of
23 various types, predominantly the 1st Special Forces Group

1 headquartered in Fort Lewis, Washington. It also has a battalion
2 that is forward deployed to Okinawa; has for many years. I've served
3 in all the battalions of the 1st Special Forces Group. I've served
4 as a detachment commander, a company executive officer, a battalion
5 executive officer, and I was also the group operations officer in the
6 1990s. I have also spent a great deal of my career in classified
7 assignments; special operations organizations and activities that
8 conduct classified military operations. But, again, for the same
9 purposes I alluded to earlier, to achieve combatant command goals and
10 objectives.

11 Q. And, sir, did you have command positions in those special
12 mission units?

13 A. I did indeed. I served at command levels as both a major,
14 a lieutenant colonel, and a colonel.

15 Q. Sir, just for background, the 1st Special Forces Group is
16 focused mainly on the Asia region?

17 A. That is correct.

18 Q. And, sir, and sort of that time period, did you have any
19 special schooling -- not special schooling, but did you attend the
20 National War College or any other additional civilian education or
21 military education?

22 A. I did. I had professional military education at virtually
23 every rank as is prescribed in the Army professional -- professional

1 development process. I also attended a number of special operations
2 unique courses, training programs, and educational programs.

3 Q. And, sir, what about sort of nontraditional jobs? For
4 example, have you worked at the Pentagon in sort of a policy capacity
5 or something similar?

6 A. I have. I think the two most significant jobs that I had
7 that took me out of the core special operations career path were in
8 2003 to 2005, I was a -- I was a staff officer in the Office of the
9 Secretary of Defense. Specifically, I worked for the Under Secretary
10 of Defense for Intelligence. I also spent a tour of duty detailed to
11 an agency -- another agency of the government where I conducted a
12 classified assignment.

13 Q. And, sir, when you were the -- working for the Under
14 Secretary of Defense for Intelligence, what was your position or
15 responsibilities or even your portfolio in that position?

16 A. My portfolio generally contained two broad compartments.
17 The first one was that I advise the Under Secretary and his senior
18 staff about activities where the functions and personnel and
19 capabilities involved in military intelligence were integrated with
20 the activities of special operations forces. The second major
21 responsibility I had is I was the prin -- I was the lead officer in
22 the Under Secretary staff for a major effort to reform military
23 intelligence practices in the department.

1 Q. And, sir, during your career, approximately how many
2 deployments have you, how many times have you deployed?

3 A. I don't have a precise number. My guess is I have well
4 over two dozen deployments overseas.

5 Q. And did those deployments include deployments to Central
6 Asia and Pakistan as well?

7 A. They did.

8 Q. Sir, I want to go back to your work as the Deputy Chief for
9 Operations at the ODRP. Again, you were in that position for 26
10 months?

11 A. That's correct.

12 Q. And was it unusual to be assigned to that job for longer
13 than a year or up to 26 months?

14 A. Yes, it was unusual. I was originally informed that my
15 assignment would be a year-long deployment. After arriving in
16 Pakistan and understanding the scope, scale, and difficulty of the
17 mission we had there, I volunteered to extend, and I ended up staying
18 for 26 months.

19 Q. And where -- where were you physically located or assigned
20 while you were working at the ODRP?

21 A. I was physically located at the U.S. Embassy, which is
22 within the diplomatic enclave of the capital city of Islamabad. The
23 Headquarters of ODRP and my commander, Vice Admiral Mike LeFever,

1 were all co-located together at the U.S. Embassy.

2 Q. And, sir, I don't think we have discussed this yet, but
3 what is the mission of the ODRP?

4 A. The mission of the ODRP had three broad components. One
5 was to represent the United States military as part of the U.S.
6 country team or U.S. Embassy there in Islamabad. Obviously there is
7 -- in all embassies there's some form of military component because
8 there are also mil-to-mil or military-to-military relationships with
9 host nations. That was one. Number two, we had a security
10 assistance program with the Pakistan military, which is a fairly
11 routine practice out of many of the embassies around the world
12 wherein we provide assistance to the host nation's military. And
13 then we also had a specific counter-insurgency support mission that
14 we were doing under military combatant command authorities whereby we
15 were providing training, advice, and assistance to those Pakistan
16 military organizations that were conducting combat operations against
17 violent extremist organizations that threatened the Pakistani state.

18 Q. And, sir, do we have comparable offices to the ODRP in
19 other countries?

20 A. We do. Not all of them have the same kind of name. Often
21 they're named -- they're called Offices of Military Cooperation or
22 Defense Attaché Offices. We had all those functions within ODRP.
23 What probably made ODRP a little unusual was the scope and scale of

1 our activities because the relationship with Pakistan had developed
2 to the point that we were providing significantly greater quantities
3 of all three of the functions that I just described than we would in
4 most countries that people are generally familiar with.

5 Q. And, sir, what is it about our relationship with Pakistan
6 that resulted in the decision to set up the ODRP there? Can you
7 describe that process?

8 A. I can. There -- there had been a Defense Attaché Office --
9 some form of a security cooperation office there for years. But the
10 coalescing of ODRP, as the organization that I have just described,
11 did not occur until approximately early 2009, when the Central
12 Command Commander decided that we needed a much more robust
13 organization that was specifically tailored to directly support the
14 Pakistan military that had begun significant combat operation --
15 operations against violent extremist organizations, specifically
16 Taliban forces that existed in the border areas between Afghanistan
17 and Pakistan. Obviously these were the same kinds of enemies that
18 the coalition forces, ISAF, and Afghans were fighting in Afghanistan.
19 So the CENTCOM Commander decided that it was in CENTCOM's interest,
20 it was in the nation's interest, and in the Pakistani's interest as
21 well, to support them more aggressively and more strongly in their
22 military operations against the Taliban.

23 Q. And, sir, you mentioned that the -- the Chief or the

1 Commander of ODRP was Vice Admiral -- Vice Admiral LeFever?

2 A. That's correct.

3 Q. Did Vice Admiral LeFever have a background in special
4 operations?

5 A. He did not. Vice Admiral LeFever is a surface warfare
6 officer of the United States Navy. One of the reasons that I was
7 assigned to the ODRP was because we had a growing special operations
8 presence in Pakistan, which the Pakistan military had requested, and
9 I was sent there to provide a -- to provide the benefit of my own
10 experience, my own affiliation with the special operations community.

11 Q. And, sir, how did your duties as the Deputy Chief or Deputy
12 Commander of ODRP differ from what your boss was doing day-to-day or
13 how did they overlap?

14 A. They overlapped significantly. As his Deputy Commander,
15 obviously I would have the responsibility one would normally
16 associate with a deputy commander. Whenever he was absent, I was
17 responsible for the functions of the organization. I assisted him in
18 all of his various advisory staff and command functions. But as I've
19 just alluded to, because I come from the special operations
20 community, what he asked me to do was focus on the application of
21 special operations forces, special operations capabilities that were
22 supporting the Pakistan military and their combat operation.

23 Q. And, sir, is it fair to say that in your role as deputy

1 chief you had oversight over everything that was happening with
2 respect to special operations in Pakistan in that timeframe?

3 A. I did.

4 Q. Sir, can you describe your contact with your Pakistani
5 counterparts and their military -- how that worked and your
6 relationships?

7 A. I can. First of all, my contact with my Pakistan military
8 counterparts was frequent. I was generally either visiting their
9 general headquarters in the Capital or visiting some of their field
10 headquarters several times a week. I was interacting with everyone
11 from the Chief of Army Staff, all the way down to Division and
12 Brigade level commanders, depending on the function, depending on the
13 activities of that particular period of time. Qualitatively, I would
14 characterize all my activities as being to ensure that the support we
15 were providing them, that they had requested, was as effective as
16 possible. So whether it was training, advising or assisting, what I
17 was constantly attempting to solicit from my Pakistani counterparts
18 is to what degree they were satisfied, to what degree they were
19 actually becoming more effective as a result of our support.

20 Q. And, sir, you said you interacted with your Pakistani
21 counterparts several times a week?

22 A. That's correct.

23 Q. And what service in the Pakistani military did you

1 primarily interact with?

2 A. The bulk of my interactions with the -- were with the Army
3 of Pakistan. It is the single largest service in the Pakistani armed
4 forces. It was conducting the vast preponderance of the counter-
5 insurgency operations against the Taliban and violent extremist
6 organizations. I did frequently engage with the other services but
7 it -- the interaction I had with the Army was orders of magnitude
8 larger.

9 Q. And, sir, what -- why is our relationship with your
10 Pakistani partners, in particular the Army, important to our national
11 security ultimately?

12 A. It is important for a number of reasons. Previously I
13 alluded to the fact that in many ways the Pakistan military is
14 combating the same violent extremist enemy in the border areas
15 between Afghanistan and Pakistan that the NATO coalition, U.S. forces
16 and Afghan forces are combating inside Afghanistan. It's well-known
17 that the border is porous, and this adversary has the ability to flow
18 back and forth across that border with a great deal of impunity.
19 So anything we can do to support the Pakistan military's
20 effectiveness against this enemy is an advantage for the forces that
21 are fighting in Afghanistan.

22 It is also important because Pakistan is a nuclear armed
23 state, but it is under significant threat from violent extremist

1 organizations, and it is in the interest of the United States to
2 ensure that Pakistan remains a stable and secure state to prevent a
3 connection being established between terrorists and violent extremist
4 organizations and their nuclear arsenal.

5 Thirdly, it is well-known that there has been a long
6 history of armed confrontation and great tension between Pakistan and
7 India. India is one of the largest trading partners of the United
8 States, as well as globally it is a rising power. Anything that
9 destabilizes the relationship between Pakistan and India is -- can
10 have an effect on U.S. national interests. And the more peaceful,
11 the more stable, the more fruitful that relationship between those
12 two nations are, the better off the United States interests are
13 regionally.

14 Q. And, sir, if you could, in an unclassified manner, how are
15 we assisting the Pakistanis with their security efforts in their
16 country?

17 A. We had a very large and robust program for providing the
18 assistance I will describe. We were providing, as a matter of formal
19 security assistance, a great deal of equipment, resources and
20 training to the Pakistan military broadly; Army, Air Force, Navy,
21 Marines. Not all of it was being used to support the counter-
22 insurgency effort in the northwest, but the vast preponderance of it
23 was.

1 Secondly, as I've already described, we had a growing
2 population of U.S. special operations personnel that have been
3 brought to Pakistan, at the Pakistani's request, to provide direct
4 support to their combat formations that were engaging with violent
5 extremist organizations preponderantly in the northwest of the
6 country in two specific provinces. One used to be known as the old
7 northwest frontier province. Today it's called Khyber Pakhtunkhwa.
8 And, also, the Federally Administered Tribal Areas, or FATA of
9 Pakistan that is right along the border with Afghanistan. The scale
10 of both of these forms of assistance and support had grown steadily
11 in the years prior to my arrival and grew steadily in the first year
12 and a half of my tenure at ODRP.

13 Q. And, sir, in October and November of 2010, how would you
14 characterize your relationship and our relationship with the
15 Pakistani military? Was it a positive one?

16 A. It was a very positive trajectory at the time. It was not
17 without problems. It was not without difficulties. It was not
18 without friction. But in general it was a positive trajectory and
19 increasingly so. It -- this is true for two reasons. First of all,
20 the Pakistani military and Pakistani government was becoming
21 increasingly aware that the struggle that they had with violent
22 extremist organizations, primarily in the northwest of their country,
23 was becoming an existential threat to the survival of the nation, and

1 they recognized that they needed help. The second reason was because
2 as you probably recall in the summer and fall of 2010, there was a
3 massive humanitarian crisis in Pakistan as the result of the worst
4 flood the country had ever experienced since it was established in
5 1947. Approximately 20 percent of the country -- of the land mass of
6 Pakistan was submerged under water as a result of this flood. For
7 approximately three months the United States government and the
8 United States military conducted a massive humanitarian relief
9 operation in Pakistan. My specific duties, aside from being the
10 Deputy Commander for ODRP, and we were the commander for the
11 humanitarian relief efforts by the US military, I also commanded a
12 battalion-size helicopter task force in northwest Pakistan, which was
13 one of the worst affected areas by this flood. And we, along with
14 other international partners and in partnership with the Pakistan
15 military, had done a great deal of very difficult work to rescue
16 people from the flood-affected areas, to provide humanitarian relief
17 supplies and to augment the Pakistani government's attempts to
18 recover from the flood. My specific task force, for example, in that
19 90-day period we recovered over 40,000 Pakistani citizens from the
20 northwest of the country. We were predictably benefiting from a
21 great deal of gratitude and good will that our efforts had earned as
22 a result of that massive flood relief effort. That was contributing
23 to the positive trajectory of our military-to-military relationships.

1 Again, not perfect, not without problems and friction, but it was
2 definitely a positive trajectory.

3 Q. Sir, do you recall becoming aware that purported Department
4 of State information had been released publicly in November 2010 and
5 December 2010?

6 A. I do indeed.

7 Q. And without disclosing classified information in an open
8 session, did you observe any impact to the mission of the ODRP in
9 this timeframe as a result of the releases?

10 A. I did.

11 TC[MAJ FEIN]: Your Honor, we would move to a closed session at
12 this time?

13 MJ: Defense, do you want to conduct an open cross-examination.

14 ADC[MAJ HURLEY]: No, ma'am.

15 MJ: How long of a recess do we need. And just before we
16 proceed into closed session, we have another witness that we're going
17 to hear from today, is that correct?

18 ATC[CPT MORROW]: That's correct, ma'am.

19 MJ: And we'll be hearing from that witness in open session,
20 right?

21 ATC[CPT MORROW]: Open and then a very brief closed session for
22 that witness.

23 MJ: Will we have a need to reopen the session for this witness?

1 ATC[CPT MORROW]: No, Your Honor.

2 MJ: All right, so for the public's benefit, what time do you
3 anticipate -- again, this is going to be tentative time. It may
4 depend how long various things that need to occur take place.

5 TC[MAJ FEIN]: Ma'am, if the parties may have a moment?

6 [Pause]

7 ATC[CPT MORROW]: Your Honor, we're going to with 1330 at this
8 time. And, of course, we'll notify the Court if we need additional
9 time.

10 MJ: Why don't we make it 1400 to ensure that we -- everything
11 that needs to be done is done.

12 ATC[CPT MORROW]: That's fine, Your Honor.

13 MJ: All right. This Court is now going to go into closed
14 session. We will reopen the Court on or about 1400 this afternoon.

15 TC[MAJ FEIN]: Ma'am, I'm sorry, and also, just for the record,
16 this is -- this closure is pursuant to Appellate Exhibit 550 of the
17 Court's previous ruling.

18 MJ: Thank you. All right. So how long of a recess do you
19 need?

20 ATC[CPT MORROW]: Twenty minutes, Your Honor.

21 MJ: Major General Nagata, please don't discuss your testimony
22 or knowledge of the case with anyone during the recess while we
23 transition into close session.

1 WIT: I Understand.

2 MJ: Court is in recess.

3 [The court-martial recessed at 1054, 6 August 2013.]

4 [END OF PAGE]

Pages 12036 through 12095 of this transcript are classified “SECRET”. This session (6 August 2013, Session 1) is sealed for Reasons 2 and 3, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.

Pursuant to AE 550, the unclassified and redacted version follows.

~~SECRET~~

1 [The court-martial was called to order at 1125, 6 August 2013.]

2 MJ: Court is called to order. Major Fein, please account for
3 the parties and the status of the court.

4 TC[MAJ FEIN]: Yes, ma'am. Your Honor, all parties [present]
5 when the court last recessed are again present. The witness is on
6 the witness stand--ma'am, all parties, when the court last recessed,
7 are again present, including--the witness is on the witness stand.
8 This is a closed session at the Secret level. The bailiff is
9 present, the Court's paralegal is present, members of the prosecution
10 and defense teams are present, and the security.

11 Also, Your Honor, the court security officer completed his
12 closed hearing checklist and that will be filed with the post-trial
13 allied papers.

14 MJ: Proceed.

15 [The examination of MG Nagata continued.]

16 Questions by the assistant trial counsel [CPT MORROW]:

17 Q. General Nagata, we talked, briefly, about the
18 , but I'd like to go back to that for a
19 moment, if we could, in closed session.

~~SECRET~~

~~SECRET~~

1 A.

2
3
4
5
6
7
8
9
10
11
12
13 Q. And, sir, you've said--now, you've said it several times,
14

15 A. Yes.

16 Q. Was the nature of that
17

18 A.
19
20
21

~~SECRET~~

~~SECRET~~

1 Q. And, sir, from your perspective,

2
3
4 A.

5
6
7
8
9
10
11
12
13
14 Q. Sir, when did it become apparent to you that the release of

15
16
17
18 A.

19
20
21
22
~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

MJ: Yes?

ADC[MAJ HURLEY]: Sorry, sir. Objection, hearsay, ma'am.

MJ: Yes?

ATC[CPT MORROW]: Your Honor, we'd offer these statements under M.R.E. 803(3), but he can describe the general nature of the conversation as well.

MJ: Well, he was just saying, "He said, 'X.'" So, what are you relying on?

ATC[CPT MORROW]: The state of mind of the declarant, M.R.E. 803(3).

MJ: All right. I'm going to overrule the objection. Go ahead.
[Examination of the witness continued.]

Q. Sir, let's go back to--

A.

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

MJ: I'm sorry, sir. Could you say that name one more time?

WIT:

MJ: Thank you.

WIT: ----at the time, .

[Examination of the witness continued.]

Q. And, sir,

A.

Q. And, sir, if you would, just describe sort of what occurred

A.

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6 ADC[MAJ HURLEY]: Captain Morrow, I'm sorry. Ma'am, we would
7 renew our objection. Based on the government's response, we don't
8 believe what General Nagata is talking about--
9
10
11
12

13 MJ: Is the request hearsay?

14 ADC[MAJ HURLEY]: Yes, ma'am. We--ma'am, we believe the request
15 is hearsay, yes.
16

17 MJ: All right. Is it offered for the truth of something in the
18 past? The government has offered it under M.R.E. 803(3), so I've
19 overruled your objection.

20 ADC[MAJ HURLEY]: Thanks, ma'am.

[Examination of the witness continued.]

~~SECRET~~

~~SECRET~~

1 Q. General Nagata, I'm handing you what's been marked as
2 Prosecution Exhibit 202 for identification. Can you just briefly
3 describe what that is?

4 A. [Examining PE 202 for identification.]
5
6

7 ATC[CPT MORROW]: Your Honor, permission to publish?

8 MJ: Go ahead. And it's Prosecution Exhibit--what?

9 ATC[CPT MORROW]: 202 for identification.

10 MJ: Okay.

11 [The assistant trial counsel published PE 202 for identification on
12 the projected screen.]

13 Q. Sir, we'll talk about
14
15
16
17

18 A.
19
20
21
22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Q. And, sir, if you would, can you, just,

A. I can.

Q.

A.

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Q. And, sir, what was the result of a conversation with

A.

~~SECRET~~

~~SECRET~~

1 entirely from the Northwest. Either the people that were operating
2 with those Frontier Corps brigades or the training centers in Khyber
3 Pakhtunkhwa--he told me, specifically, "Do not bring them back to
4 Islamabad. Do not send them back to the United States." His
5 expectation, as he explained it to me, was this was a temporary
6 suspension.

7 Q. How did having

8

9 A.

10

11

12

13

14

15

16

17

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16 ADC[MAJ HURLEY]: Captain Morrow-----
17 MJ: Yes?
18 ADC[MAJ HURLEY]: ----if I can interrupt. Ma'am, just our
19 1001(b)(4) objection.
20 MJ: Got it.
21 [Examination of the witness continued.]

~~SECRET~~

~~SECRET~~

1 Q. And, sir,

2

3

4 A.

5

6

7 Q. And, sir, you referred to, sort of, the--and maybe I'm

8 using my own word--but the--

9

10 A. Yes.

11 Q. Can you describe how that worked

12

13 A.

14

15

16

17

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

Q. And what did you observe after the release,

A.

MJ: And how long were you there? I'm sorry, sir.

WIT: I left in September of 2011.

~~SECRET~~

~~SECRET~~

1 ADC[MAJ HURLEY]: Ma'am, we would object to that last answer,
2 again, under 1001(b)(4).

3 MJ: The 2011 or the other one?

4 ADC[MAJ HURLEY]: The 2011. The--I'm sorry, ma'am. The
5 information--the 2011 information

6

7 MJ: All right. Thank you.

8 [Examination of the witness continued.]

9 Q. Circa, once the transition a bit into some of the--sort of
10 the other observations and impacts you experienced while you were
11 there. Are you familiar with the phrase,

12

13 A. I am.

14 Q. And,

15

16

17 A.

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

Q. And, sir, was the

A.

Q.

A.

ADC[MAJ HURLEY]: Captain Morrow, again--ma'am, 1001(b)(4).

~~SECRET~~

~~SECRET~~

1 MJ: Okay. Let me ask just a follow up question on that. I
2 don't understand--

3 WIT:
4
5
6
7
8
9
10
11
12
13
14

15 MJ: All right. Thank you. I have your objection.

16 ADC[MAJ HURLEY]: Yes, ma'am.

17 [Examination of the witness continued.]

18 Q. Sir, you referred to a,
19
20
21

~~SECRET~~

~~SECRET~~

1 A. I can.

20 ADC[MAJ HURLEY]: Captain Morrow--1001(b)(4), ma'am.

21 MJ: Got it.

22 [Examination of the witness continued.]

~~SECRET~~

~~SECRET~~

1 Q. Sir, did this

2

3

4 A.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20 ADC[MAJ HURLEY]: Captain Morrow, 1001(b)(4), ma'am.

21 [Examination of the witness continued.]

~~SECRET~~

~~SECRET~~

1 Q. And, sir,

2

3

4

5 A.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

ADC[MAJ HURLEY]: Sorry, 1001(b)(4), ma'am.

Q. Sir, overall,

A.

Q. And, sir,

A. No, it had not.

ATC[CPT MORROW]: Thank you, sir.

MJ: Cross examination?

ADC[MAJ HURLEY]: Thank you, ma'am.

ATC[CPT MORROW]: I'm handing the court reporter Prosecution
Exhibit 202 for identification.

~~SECRET~~

~~SECRET~~

1 ADC[MAJ HURLEY]: Captain--well, let's leave that just in case
2 it comes up. I don't know if it will, but in an abundance of
3 caution, thank you.

4 I'm putting prosecution Exhibit 202 for identification back
5 up on the monitor. Sir, can you see it okay?

6 WIT: I can.

7 ADC[MAJ HURLEY]: Sir, I'm going to take a second just to get
8 organized, if that's okay. Ma'am, same.

9 MJ: Certainly.

10 **CROSS-EXAMINATION**

11 **Questions by the assistant defense counsel [MAJ HURLEY]:**

12 Q. It's barely morning. Good morning, General Nagata.

13 A. Good morning.

14 Q. Sir, let's start off with
15
16
17

18 A. That is correct.

19 Q. And----

20 MJ: when?

21 ADC[MAJ HURLEY]: I'm going to answer that question right now,
22 ma'am.

~~SECRET~~

~~SECRET~~

1 Q.

2

3 A. That is correct.

4

5 Q.

6 A. Roughly.

7

8 Q.

9

10

11 A. Yes.

12 Q.

13

14 A.

15

16 Q. And you also describe then, generally, it's difficulties?

17 A.

18 Q.

19

20 A. That is correct.

~~SECRET~~

~~SECRET~~

1 Q.

2

3

4 A.

5 Q. Not just

6 A. That's correct.

7 Q. Often--and this is just a generalized notion, General

8 Nagata--but often the concerns and the--that are felt in the

9

10

11

12 A. Very often, yes.

13 Q.

14

15

16 A.

17

18

19

20

21

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

Q. And that

A. It does.

Q.

A. It does.

Q. And there were concerns--and just getting back to the
general arc of my questions--

A.

~~SECRET~~

~~SECRET~~

1 Q. But one dimension of that concern--

2

3

4 A. In some cases, yes.

5 Q. Now, you testified earlier that there

6

7 A. Yes.

8 Q. And that

9

10 A. It did.

11 Q.

12

13 A. That's correct.

14 Q.

15

16

17 A.

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1 Q.

2

3

4 A. They do.

5 Q. And for the longest time,

6

7 A.

8 Q.

9

10 A.

11

12

13

14 Q.

15

16

17 A.

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1 Q. And the WikiLeaks disclosures,

2 Is that right?

3 A.

5 Q.

8 A. In my estimation, yes.

9 Q. And there were other factors that contributed to the

12 A.

15 Q. And, sir, I just want to go over parts of the closed direct
16 that you just did with Captain Morrow, okay?

17 A. Uh-huh.

18 Q. The

20 A. Correct.

21 Q. And there was also

22 A. Correct.

~~SECRET~~

~~SECRET~~

1 Q.

2

3 A. That's correct.

4 Q.

5

6 A.

7

8

9 Q. And we'll get to--

10

11 A.

12

13

14

15 Q. Yes, sir. So--and, again, going back to the closed part of
16 your direct, sir, you indicated with Captain Morrow that there were--

17

18

19 A.

20 Q. Are there--and that observation that you had was from your--
21 -from

22

~~SECRET~~

~~SECRET~~

1 A.

2
3
4
5
6
7
8
9
10
11
12 Q. Did you attempt to identify any
13
14

15 A.

16
17
18
19
20
21 Q. And these were with your--
22

~~SECRET~~

~~SECRET~~

1 A.

2
3
4
5 Q. Now, sir, again, you testified in your closed direct that
6
7
8

9 A.

10
11
12 Q. And then, after that,

13 A. We did.

14 Q. Did you attempt to identify any other--
15
16

17 A.
18
19
20
21
22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

Q. Now, and just since we're on the topic, sir--in your
conversations--

A. Okay.

Q.

A. He did.

Q. And that was reflected, also,

A. It was.

Q.

A. That is correct;

~~SECRET~~

~~SECRET~~

1 Q. Now, you testified that--

2
3 A. That's correct.

4 Q. And that--

5
6 A. Approximately.

7 Q. And you testified in your open direct that there were

8
9
10 A. There were.

11 Q. And that those challenges,

12
13
14 A.

15
16
17
18
19
20
21
22

~~SECRET~~

~~SECRET~~

1

2

3 Q. And, sir,

4

5 A. Uh-huh.

6 Q. ----there were--

7

8 A. There is always friction in that relationship.

9 Q. And, typically speaking, from our conversation earlier
10 today,

11

12

13 A.

14

15

16

17

18

19

20

21 Q. Right. Sir, I'm just editing a couple of questions I've
22 already asked you.

~~SECRET~~

~~SECRET~~

1 Now, this changed--or,

2
3
4
5 A. Yes, it was,

6
7
8
9
10
11
12
13 MJ: What was that number again, I'm sorry?

14 WIT:

15 MJ: Thank you.

16 [Examination of the witness continued.]

17 Q. And that was the result of

18
19 A. Yes, it was.

20 Q. So let's talk about--and these, again, sir are in general
21 terms--

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

A. They are, indeed.

Q. And those with

A. Right. I would characterize it a little differently.

Q.

A. I don't think I know

Q. They--

A.

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

Q.

A. The topic you've raised is something I cannot discuss in this setting.

Q. Yes, sir. Sir, could you discuss the--

A.

~~SECRET~~

~~SECRET~~

1 Q. The-do you recall assessing that

2
3
4 A.

5
6
7
8
9
10 Q. Yes, sir. Generally speaking, sir, you knew that

11
12
13 A. Yes, that's always true.

14
15
16
17 Q. And that attitude existed before the WikiLeaks disclosures?

18 A. It did.

19 Q. And it certainly existed after as well?

20 A.

21

~~SECRET~~

~~SECRET~~

1 Q. All right, sir. So, what I want to do now is I'm going to
2 try be, in my subsequent questions, very specific in terms of time
3 frames.

4 MJ: All right.

5 Q. And the first time frame that I want to talk about is from
6

7 A. Uh-huh.

8 Q.

9 MJ: All right.

10 Q. So that discreet period of time.

11 A. Right.

12 Q. Sir, how long was that period of time, to your memory?

13 A. My recollection is that spanned,
14

15 MJ: I'm sorry, that

16 WIT:
17

18 [Examination of the witness continued.]

19 Q. So, approximately 2 months?

20 A. Thereabouts.

~~SECRET~~

~~SECRET~~

1 Q. All right, sir. So, in--just to

2
3
4 A.

5 Q.

6
7 A.

8
9 Q.

10
11 A. It did.

12 Q. And, again, you indicated that that incident happened
13 around February of 2011?

14 A. Yes, I can't remember the exact date, but I believe it was
15 in February.

16 Q. And, sir, now, let's go back to the substance of your
17

18 A. Yes.

19 Q.

20
21
~~SECRET~~

~~SECRET~~

1 A. Yes.

2

3

4

5 Q.

6

7 A.

8 Q.

9 A.

10 Q.

11

12 A.

13 Q.

14

15 A.

16 Q.

17

18 A.

19 Q.

20 A.

21 Q.

22

~~SECRET~~

~~SECRET~~

1 A.

2 Q.

3

4

5 A.

6 Q.

7

8

9

10 A.

11

12

13 Q. And in the--

14

15 A. Okay.

16 Q. Going back to

17

18

19

20 A.

21

22

~~SECRET~~

~~SECRET~~

1

2

3

4

5

6

7

8 Q.

9

10 A.

11

12 Q. Now,

13

14

15 A.

16

17

18 Q.

19

20 And, sir, let me just skip to--that was a very convoluted
21 question and I will skip that very convoluted question and move onto
22 something----

~~SECRET~~

~~SECRET~~

1 A. Okay.

2 Q. ----I hope is less convoluted.

3 A. All right.

4 Q.

5

6 A. Yes.

7 Q.

8 A. That's correct.

9 Q. And he

10

11 A. Right.

12 Q.

13 A.

14 Q.

15 A.

16

17

18

19

20 Q. And the effects that you

21 A. Uh-huh.

~~SECRET~~

~~SECRET~~

1 Q. ----were those all of the effects that you talked with
2 Captain Morrow about, sir, in your direct examination?

3 A. Yes.

4 Q. Do you recall, in the conversation that you had with
5 Captain Morrow during your direct examination,

6

7

8 A.

9

10

11

12 Q. And speaking of the

13

14

15 A. All right.

16 Q. The

17

18 A. Yes, as far as I know, unrelated.

19 Q. Now,

20

21

22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

A. In my view, yes.

Q. Right. And the--and it goes both ways.

A. I do not know.

Q.

A. It did.

Q.

A.

~~SECRET~~

~~SECRET~~

1

2

3

4

5

6

7 Q. But it did

8 A. Absolutely.

9 Q. And that

10

11 A. That is correct.

12 Q.

13 A. It did.

14 Q. And that--

15

16 A. I think that's the right date, yes.

17 Q. And the United States government representatives killed

18 Osama bin Laden in his home in Abbottabad, Pakistan?

19 A. That's correct.

20 MJ: And the date of that was?

21 WIT: I'm sorry, ma'am?

22 MJ: The date of that was?

~~SECRET~~

~~SECRET~~

1 WIT: I believe you said 1 May of 2011.

2 ADC[MAJ HURLEY]: Does that generally comport with your memory,
3 sir?

4 WIT: I believe that's the right date.

5 [Examination of the witness continued.]

6 Q.

7
8 A.

9 Q. And that concern--

10
11
12
13 A. It was.

14
15
16
17
18
19
20

~~SECRET~~

~~SECRET~~

1 Q. And this incident--

2
3
4 A. I did not.

5 Q.

6
7
8
9 A. Yes, that's my understanding.

10 Q. Overall,

11
12 A. It did.

13 Q. And there--again, much like before, counterfactuals, here,
14 are just far too speculative to suss out which was--which of these
15 three complicating factors, sir, was the worst to have to deal with?

16 A. Yes, however,
17
18
19
20
21
22

~~SECRET~~

~~SECRET~~

1

2

3

4 Q. Now, sir, you talked about

5

6 A. Uh-huh.

7 Q.

8

9

10

11 A. Yes.

12 Q. And that

13 A. Yes.

14 Q.

15 A.

16 Q.

17 A.

18 Q. And we

19

20 A.

~~SECRET~~

~~SECRET~~

1 ADC[MAJ HURLEY]: Just going through the other questions I have,
2 sir, to make sure that I've already asked them. If I can have a
3 second, ma'am? Sir, thank you. I don't have any further questions.

4 MJ: Redirect?

5 ATC[CPT MORROW]: Just briefly, Your Honor.

6 **REDIRECT EXAMINATION**

7 **Questions by the assistant trial counsel [CPT MORROW]:**

8 Q. Sir, you

9

10 A. I did.

11 Q. And, in your opinion,

12

13 A.

14

15

16 Q. And how would you

17

18 A.

19

20

21

22

~~SECRET~~

~~SECRET~~

1

2

3

4 Q. And, sir,

5

6

7 A.

8

9

10

11

12

13

14

15

16 Fortunately,

17

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1 ATC[CPT MORROW]: Thank you, sir. I have nothing further.

2 MJ: Sir, I just have a couple of questions.

3 **EXAMINATION COURT-MARTIAL**

4 **Questions by the military judge:**

5 Q. When was the flood?

6 A. The flood occurred in August of 2010.

7 Q. I believe testified to WikiLeaks release was early December
8 of 2010?

9 A. I think the release was in late November.

10
11
12
13 Q. How did the WikiLeaks--

14
15 A.

16
17
18
19 Q. And I believe you testified earlier,

20
21

~~SECRET~~

~~SECRET~~

1

2

3 A.

4

5

6

7

8

9 Q.

10

11 A.

12

13

14

15

16 Q.

17

18 A. Yes.

19 Q.

20

21 A.

22

~~SECRET~~

~~SECRET~~

1

2

3

4

5

6

7

8

9

10

11

12 Q. This

13 A. Yes.

14 Q.

15

16

17 A.

18

19

20 Q. There was a

21

22

~~SECRET~~

~~SECRET~~

1
2
3
4 A. No, there was not.
5

6 A. No.

7 MJ: I think that's all I have. Does either side have anything
8 further, based on what I asked?

9 ADC[MAJ HURLEY]: Ma'am, I do have a question.

10 MJ: Go ahead.
11

RE CROSS EXAMINATION

12 **Questions by the assistant defense counsel [MAJ HURLEY]:**

13 Q. General Nagata,
14
15

16 A. That is correct.

17 ADC[MAJ HURLEY]: Thanks.

18 MJ: Anything else from the government?

19 ATC[CPT MORROW]: One more question, Your Honor.

~~SECRET~~

~~SECRET~~

REDIRECT EXAMINATION

Questions by the assistant trial counsel [CPT MORROW]:

Q. Sir, in your estimation,

A.

ATC[CPT MORROW]: Thank you.

MJ: Well, the defense counsel's actually triggered another one from me.

EXAMINATION BY THE COURT-MARTIAL

Questions by the military judge:

Q. The question that you responded to was:

A. That's correct.

Q. Did the language ever change

A.

~~SECRET~~

~~SECRET~~

1 Q. I believe you testified earlier that

2
3
4
5 A. Yes, they did.
6
7
8
9

10 Q. And I don't want to misinterpret things that you say-
11
12

13 A.
14
15
16

17 MJ: Thank you, sir. Any follow-up based on that?

18 ATC[CPT MORROW]: No, Your Honor.

19 ADC[MAJ HURLEY]: No, ma'am.

20 MJ: Temporary or permanent excusal?

21 ATC[CPT MORROW]: Temporary, Your Honor.

~~SECRET~~

~~SECRET~~

1 [The witness was duly warned, temporarily excused, and withdrew from
2 the courtroom.]

3 ATC[CPT MORROW]: I'm retrieving Prosecution Exhibit 202 for
4 identification from the ELMO.

5 ADC[MAJ HURLEY]: Thank you, Captain Morrow.

6 [The assistant trial counsel handed PE 202 for identification to the
7 court reporter.]

8 MJ: All right. The Court is noticing it's a little over an
9 hour until 1400. Do you want to make it a little bit later?

10 ADC[MAJ HURLEY]: No, ma'am, I think we can make 1400.

11 MJ: You can make 1400?

12 ADC[MAJ HURLEY]: Yes, ma'am, and let me rephrase my answer to
13 the Court's question: I'll be read at--or the defense will be ready
14 at 1400.

15 MJ: Okay. Because what I don't want to do is have dribbles and
16 drabs, "I need another 15 minutes, I need another 15 minutes," so
17 we're going to be ready at 1400?

18 ADC[MAJ HURLEY]: Yes, ma'am.

19 MJ: Okay, so be it. Court is in recess until 1400.

20 [The court-martial recessed at 1249, 6 August 2013.]

~~SECRET~~

1 [The court-martial was called to order at 1405, 6 August 2013.]

2 MJ: Court is called to order. Major Fein, please account for
3 the parties.

4 TC[MAJ FEIN]: Yes, ma'am. All parties in the Court when the
5 last recessed are again present except Captain Overgaard is absent.
6 Also, ma'am, this is an unclassified session, and prior to its
7 opening the Court security officer completed his open hearing
8 checklist to be filed with the post-trial allied papers.

9 MJ: Is there anything we need to address before we call the
10 witness?

11 TC[MAJ FEIN]: No, ma'am.

12 ADC[MAJ HURLEY]: No, ma'am.

13 MJ: Please call the witness.

14 ATC[CPT MORROW]: The United States calls Colonel Julian
15 Chesnutt.

16 COLONEL JULIAN CHESNUTT, U.S. Air Force, was called as a witness for
17 the prosecution, was sworn, and testified as follows:

18 DIRECT EXAMINATION

19 Questions by the assistant trial counsel [CPT MORROW]:

20 Q. Sir, you are Colonel Julian Chesnutt, United States Air
21 Force?

22 A. Yes.

23 Q. And you are currently the senior defense official and the

1 Defense Attaché to Israel?

2 A. Yes.

3 Q. Sir, where are you currently physically located? Do you
4 work out of Israel?

5 A. Tel Aviv.

6 Q. And how long have you been in that position?

7 A. Approximately one year.

8 Q. And, sir, generally, what are your responsibilities as the
9 senior defense official and the defense attaché to Israel?

10 A. Primarily duty is the military advisor to the U.S.
11 ambassador.

12 Q. And do you supervise personnel in that position?

13 A. Approximately 30 personnel.

14 MJ: I'm going to ask you, if you would, sir, please speak up
15 just a little bit.

16 WIT: Okay.

17 Q. You said you supervise approximately 30 personnel?

18 A. Yes.

19 Q. And who are the people you supervise?

20 A. I have attachés from every service, operations NCOs from
21 every service, and locally engaged staff Israelis and several GS
22 civilians.

23 Q. And, sir, can you describe, generally, the oversight

1 relationship between your service of the United States Air Force, the
2 Department of Defense, and the Department of State, how that sort of
3 works together?

4 A. Right. I'm still, obviously, an Air Force officer on loan
5 to -- for the -- administratively to Defense Intelligence Agency who,
6 in turn, staffs us out to State Department run U.S. embassies.

7 Q. And, sir, as the defense attaché, are you part of the
8 country team?

9 A. Yes, I am.

10 Q. And, sir, prior to your assignment as a senior defense
11 official and defense attaché to Israel, where were you assigned?

12 A. To Islamabad, Pakistan.

13 Q. And where were you working in Islamabad?

14 A. I was working in the U.S. Embassy there as the defense
15 attaché.

16 Q. And were you the senior defense attaché to Pakistan?

17 A. Yes, I was.

18 Q. And how long were you in that position, sir?

19 A. Two years.

20 Q. And can you give me like sort of an approximate start date
21 and an approximate end date?

22 A. Mid-November 2010 until October 2012.

23 Q. And, sir, as the senior defense attaché in Pakistan, did

1 you work under the ODRP?

2 A. I worked alongside with ODRP, but we had a separate
3 reporting chain.

4 Q. And, sir, generally, what were your responsibilities in
5 that position, sort of the same as what you're doing now?

6 A. Also, the -- as a military advisor to the U.S. ambassador.

7 Q. And can you describe -- do you have, like, representational
8 duties and that sort of thing as well? Can you describe that for the
9 Court, please?

10 A. Yes, I'm the -- I represent the Department of Defense to
11 the host nation military. And then each of my service attachés,
12 whether Air Force, Navy, Army represent their specific service to the
13 host nations, Air Force, Army, Navy as the case may be.

14 Q. And, sir, are you here today to discuss impacted defense
15 attaché operations you observed as a result of disclosure of
16 purported Department of State information?

17 A. Yes, I am.

18 Q. All right, sir. Before we sort of dive more deeply into
19 your time in Islamabad, I'd like to briefly discuss your career
20 progression. How long have you served as an officer in the United
21 States Air Force?

22 A. Twenty-four years.

23 Q. And what was your military area of specialty before

1 becoming a defense attaché?

2 A. Pilot. Specifically A-10 and F-16 pilot.

3 Q. And have you held any command positions in the Air Force?

4 A. Yes, several flight commands and squadron command and
5 deputy group command.

6 Q. And have you deployed during your career?

7 A. Yes, I have.

8 Q. To where, sir?

9 A. To Iraq, to Korea, twice to Turkey, to Cape Verde, to
10 Panama, to Romania and -- those are my primary ones.

11

12 Q. And, sir, how do you -- can you describe for the Court how
13 you made the transition from sort of a pilot career track to the
14 defense attaché service?

15 A. I was serving one year as an instructor at Georgetown
16 University as a national defense fellow and I was working for --
17 supervised by a former U.S. Ambassador who recommended that career
18 path.

19 Q. And can you describe the training you received as a defense
20 attaché?

21 A. Approximately six months of attaché training, followed by
22 six months of Urdu language training, which is the national language
23 of Pakistan, and approximately six months of flight training to fly

1 the C12 aircraft, which is located in Pakistan.

2 Q. So you had -- you had additional flight duties as well as
3 your sort of duties as a defense attaché in Pakistan?

4 A. Yes, I did.

5 Q. And, sir, approximately how long from sort of start to
6 finish was the defense attaché training?

7 A. Eighteen months.

8 Q. And, sir, how does the defense attaché training prepare you
9 for particular countries assignments?

10 A. The attaché School itself is general. It trains attachés
11 for every country -- U.S. attaches for every country. And then you
12 have a phase of approximately one month where you meet with experts
13 in the U.S. government on your host nation in the country you go to.
14 Then, in addition to that, you normally receive a language training
15 and that can be anywhere from three months to a year.

16 Q. And, sir, how are you -- how did you end up working in
17 Pakistan versus some other country? How did that work?

18 A. I was -- I volunteered to go. Then my service -- the Air
19 Force nominated me and a joint decision through DIA and the Air Force
20 and the joint staff and vetting by the ambassador to take the
21 position.

22 Q. And, sir, did you have any experience in that region prior
23 to your position as the defense attaché there?

1 A. No, my first assignment.

2 Q. And what about your experience with bilateral military
3 relationships?

4 A. I had conducted several combined exercises primarily with
5 NATO allies throughout my career.

6 Q. All right, sir, let's talk about some of your
7 responsibilities while assigned to Islamabad -- or U.S. Embassy,
8 Islamabad. What were the primary sort of missions you were promoting
9 while assigned as a defense attaché there? What were you trying to
10 do? Or what was the mission of the attaché office?

11 A. We were -- we coordinated engagements, exercises, and
12 defense cooperation with the host nation military. We also
13 represented our service components to the host nation military and we
14 -- we gave advice to other members of the country team and other
15 members of ODRP about how we best thought we could assist the
16 Pakistanis in conducting counter-insurgency operations to assist our
17 efforts in Afghanistan.

18 Q. And, sir, while serving as the defense attaché to Pakistan,
19 do you recall becoming aware of the release of purported State
20 Department information in the November of 2010 timeframe, so shortly
21 after you got there?

22 A. Yes.

23 Q. And, generally, how did you first become aware of -- that

1 this was something that was going on?

2 A. Through the open press.

3 Q. Are you talking about the open press in Pakistan?

4 A. In Pakistan and through U.S. outlets in Pakistan.

5 ATC[CPT MORROW]: Your Honor, as this time, we would move to a
6 closed session, but if defense wants an opportunity to cross.

7 ADC[MAJ HURLEY]: Ma'am, we don't have any open session cross-
8 examination questions.

9 MJ: All right. Well, is there any reason that we need to have
10 another open session before the end of the day? I will have my
11 ruling with respect to yesterday's witness. However, I can give it
12 to the parties and just read it on the record following the next
13 morning if that's preferable.

14 ATC[CPT MORROW]: Tomorrow is fine, Your Honor.

15 MJ: What time would you like us to start tomorrow morning?

16 ATC[CPT MORROW]: Ma'am, do you want to start at 10? Can we have
17 a second to talk?

18 MJ: Yes, please.

19 [Pause]

20 ADC[MAJ HURLEY]: Ten o'clock's fine, ma'am.

21 MJ: We'll start at 10:00?

22 ADC[MAJ HURLEY]: Yes, please.

23 MJ: All right. Members of the gallery, we are going to move

1 into closed session based upon my findings in Appellate Exhibit -- I
2 believe it was 450?

3 TC[MAJ FEIN]: 550, Your Honor.

4 MJ: 550. Okay. That will be the conclusion of the open
5 proceedings today. We will be starting at 1000 tomorrow. As I said
6 earlier, I have a ruling ready to go for the witness that testified
7 yesterday. I will give the parties that ruling in advance today, and
8 I will read it on the record tomorrow. Is there anything else we
9 need to address before we recess for the closed session?

10 ADC[MAJ HURLEY]: No, ma'am.

11 TC[MAJ FEIN]: No, ma'am.

12 MJ: All right. Colonel Chesnutt, during the recess, please
13 don't discuss your testimony with anyone. As soon as we recess
14 you're free to step out.

15 WIT: Yes, ma'am.

16 MJ: Court is in recess.

17 **[The court-martial recessed at 1415, 6 August 2013.]**

18 **[END OF PAGE]**

Pages 12105 through 12131 of this transcript are classified “SECRET”. This session (6 August 2013, Session 2) is sealed for Reasons 2 and 3, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.

Pursuant to AE 550, the unclassified and redacted version follows.

~~SECRET~~

21 [The court-martial was called to order at 1445, 6 August 2013.]

~~SECRET~~

~~SECRET~~

1 MJ: Court is called to order. Major Fein, please account for
2 the parties and the status of the courtroom. And----

3 TC[MAJ FEIN]: Yes.

4 MJ: ----the witness is on the witness chair.

5 TC[MAJ FEIN]: Yes, ma'am. All parties, when the court last
6 recessed, are again present. This is a closed session at the Secret
7 level, Your Honor. Included with the parties is the bailiff, the
8 Court's paralegal, members of the defense team, members of the
9 prosecution team, and security.

10 Also, the court security officer has completed a closed
11 hearing checklist and that will be filed with the post-trial allied
12 papers.

13 MJ: Okay. Proceed.

14 **[Examination of Colonel Chesnutt continued.]**

15 **Questions by the assistant trial counsel [CPT MORROW]:**

16 Q. Colonel Chesnutt, before we get into some of the impact you
17
18
19
20
21

~~SECRET~~

~~SECRET~~

1 A.

2

3 Q. And how do you--

4 A.

5

6

7

8

9

10

11

12

13 Q.

14

15

16

17 A.

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1 Q. All right. So let's sort of move into what happened in the
2 aftermath of the release of cables.

3

4

5 A.

6

7

8

9 Q. And why did you do that, sir?

10 A.

11

12

13 Q. So was it more, sir,

14

15 A. Right.

16 Q. And, sir,

17

18 A. Yes----

19 Q.

20 A. Yeah,

21 Q. And can you explain that, please?

~~SECRET~~

~~SECRET~~

1 A.

2

3

4 Q. And you were the--

5

6 A. Yes, I did.

7 Q. And, sir,

8

9 A.

10 Q. And who was set to be his replacement?

11 A.

12 Q.

13

14 A.

15 Q. And why not?

16 MJ: Yes?

17 ADC[MAJ HURLEY]: I'm sorry to interrupt. 1001(b)(4), ma'am.

18 MJ: Okay. Just a moment. Noted.

19 [Examination of the witness continued.]

20 Q.

21

22

~~SECRET~~

~~SECRET~~

1 A.

3 Q.

5 A.

8 Q. All right, so let's explore this a little bit.

11 A. It's a--

17 Q.

18 A.

20 Q. And do you----

21 MJ: When?

~~SECRET~~

~~SECRET~~

1 Q.
2
3 A.
4 Q.
5
6 A.
7
8 Q.
9
10 A.
11
12
13
14
15 Q.
16
17 A.
18
19 Q.
20
21 A.
22 MJ:

~~SECRET~~

~~SECRET~~

1 ADC[MAJ HURLEY]:

2 MJ:

3 [Examination of the witness continued.]

4 A.

5

6

7

8

9 Q.

10

11 A. Right.

12 Q.

13 A.

14

15 MJ: The---strike----

16 WIT: Okay.

17 [Examination of the witness continued.]

18 Q.

19

20

21 A.

22

~~SECRET~~

~~SECRET~~

1

2

3

4

5

6 Q.

7

8

9

10 A. Yes, it became increasingly difficult.

11 Q.

12

13 A. Yes.

14 Q. ----

15

16 A.

17

18

19

20

21 ADC[MAJ HURLEY]: Captain Morrow, if I could--1001(b)(4) on the

22

~~SECRET~~

~~SECRET~~

1 MJ: Okay. Got it.

2 [Examination of the witness continued.]

3 Q.

4

5

6 A. Yes, it was.

7 Q. And can you explain that, please?

8 A.

9

10

11

12

13

14

15 MJ: Yes?

16 ADC[MAJ HURLEY]: Pardon me. Objection, hearsay, ma'am.

17 MJ: All right. What's the----

18 ATC[CPT MORROW]: Your Honor, we'd often under 803(3) as well.

19 MJ: Okay. Your objection is noted.

20 ADC[MAJ HURLEY]: Yes, ma'am.

21 MJ: And go ahead; it's overruled right now.

22 [Examination of the witness continued.]

~~SECRET~~

~~SECRET~~

1 Q. Sir,

2

3 A.

4

5

6 Q.

7

8 A. Yes, it was.

9 Q. And how so?

10 A.

11

12

13

14

15

16 Q.

17

18

19 A. Yes.

20 Q.

21

22 A. As a rule, yes.

~~SECRET~~

~~SECRET~~

1 Q.

2

3

4 A.

5

6

7 Q.

8

9

10

11

12

13

14

15

16

17 Q.

18

19 A.

20

21

~~SECRET~~

~~SECRET~~

1 ADC[MAJ HURLEY]: Ma'am, the

2 1001(b)(4).

3 MJ: Okay.

4 [Examination of the witness continued.]

5 Q.

6

7

8 A.

9

10

11

12

13 Q. And did that

14

15 A.

16

17

18 Q. Sir,

19

20

21

22 A.

~~SECRET~~

~~SECRET~~

1 ATC[CPT MORROW]: Thank you, sir.

2 MJ:

3 WIT:

4 MJ: Thank you. Defense?

5 ADC[MAJ HURLEY]: Yes, ma'am. Sir, ma'am, if I can take a
6 second to get organized here?

7 **CROSS-EXAMINATION**

8 **Questions by the assistant defense counsel [MAJ HURLEY]:**

9 Q. Good afternoon, sir.

10 A. Good afternoon.

11 Q. Sir,

12 A.

13 Q.

14

15 A. Yes.

16 Q.

17 A. Yes.

18 Q.

19 A. Yes.

20 Q.

21

~~SECRET~~

~~SECRET~~

1 A.

2

3 Q. Sir, you testified, just there at the end,

4

5 A. Yes.

6 Q. Do you recall--we've had two interviews before today, is
7 that correct?

8 A. Yes.

9 Q. One was yesterday and one was months ago over in Tamberg?

10 A. Yes.

11 Q. And, in those interviews, you indicated that,

12

13

14

15 A. Yes.

16 Q. So, sir, and going on,

17

18

19 A. Yes.

20 Q. And, sir, just to reinforce in my mind,

21

22 A.

~~SECRET~~

~~SECRET~~

1 Q.

2 A. 2012.

3 Q. 2012?

4

5 A.

6

7 Q. So, sir, getting back to these

8

9

10 A. Yes.

11 Q.

12 A. Yes.

13 Q.

14 A. Yes.

15 Q.

16 A. Yes.

17 Q. Sir, --and before I move on from

18 that----

19 A. Right.

20 Q. ----in our conversations previously,

21

22 A. Right.

~~SECRET~~

~~SECRET~~

1 Q.

2

3

4 A. Yes.

5 Q. And that's your testimony, here, today as well?

6 A. Yes.

7 Q.

8

9 A. Yes.

10 Q. So, sir, moving on to

11

12

13

14 A.

15 Q. The bin Laden raid. Thank you. Abbottabad. And that
16 happened approximately 1 May 2011?

17 A. Yes.

18 Q. And the bin Laden raid--that's the raid that bin Laden was
19 killed, right?

20 A. Yes.

21 Q.

22 A. Yes, it did.

~~SECRET~~

~~SECRET~~

1 Q.

2

3

4 A.

5

6 Q.

7

8 A. Yes.

9 Q.

10

11

12 A.

13

14

15

16 Q. And, sir, going back, again,

17

18 A. Sure.

19 Q. ----I just neglected to ask you this question.

20 , in no way, connected to the WikiLeaks disclosures,

21 to you knowledge, right?

22 A. No, no connection.

~~SECRET~~

~~SECRET~~

1 Q. And the Abbottabad raid--I'm just going to have to use my

2 Oklahoma pronunciation on that----

3 A. "Bin Laden raid" works too.

4 Q. ----and I apologize. Yeah, "bin Laden raid." Let's go
5 with that one.

6

7 A. Not that I'm aware of.

8 Q.

9

10

11 A. Yes.

12 Q.

13

14 A.

15

16 MJ: By what time?

17 WIT: By May 2011.

18 MJ: I don't mean to interrupt you,

19

20 WIT:

21

22 MJ: Thank you.

~~SECRET~~

~~SECRET~~

1 [Examination of the witness continued.]

2 Q. Thank you, sir. Sir, we talked, yesterday, about your
3 leaving in October of 2012?

4 A. Yes.

5 Q. And I recall, yesterday,

6

7 A. Yes.

8 Q.

9

10 ACC: Yes.

11 Q.

12 A. Yes, I have.

13 Q.

14

15 A.

16

17

18

19 Q. Sir, the--I forgot to ask you about

20 So, if we could go back to that line
21 of questioning, sir, maybe. I apologize for skipping around.

22 A. Right.

~~SECRET~~

~~SECRET~~

1 Q.

2

3 A. Yes.

4 Q. The

5 A. Yes.

6 Q.

7

8 A.

9

10

11 Q. And, sir, if I could get you to tease out, in your mind,
12 the problem that resulted only because

13

14

15 A. About a month.

16 Q. Okay, so the early part of December 2010?

17 A. Yes.

18 Q. And the

19 A. Yes.

20 Q. So there was a 2-month time window when it--when the only
21 complicating factor was the WikiLeaks disclosures.

22 A. Yes.

~~SECRET~~

~~SECRET~~

1 Q. And the incidents that you described with Captain Morrow on
2 direct----

3 A. Yes.

4 Q. ----can--and I believe there were a few of them and I'll
5 just go through a few of them just to see if you can recall if that
6 was just during that time window or at any other time window.

7 A. Yes.

8 Q. All right?

9

10

11 A. Yes,

12 Q.

13 A. Yes.

14 Q.

15

16

17 A.

18

19

20

21

~~SECRET~~

~~SECRET~~

1

2

3 Q. And, in your memory,

4 A. Yes.

5 Q. Can you--as you sit there right now, can you think of any
6 of the effects, that you talked with Captain Morrow on direct,

7

8

9 A.

10

11

12 ADC[MAJ HURLEY]: Sir, I'm just going to take a look at my
13 notes. Colonel Chesnutt, I don't have any more questions.

14 WIT: Thank you.

15 MJ: Redirect?

16 ATC[CPT MORROW]: Briefly, Your Honor.

17 **REDIRECT EXAMINATION**

18 **Questions by the assistant trial counsel [CPT MORROW]:**

19 Q. Sir, you

20

21

22 A. Right.

~~SECRET~~

~~SECRET~~

1 Q.

2

3 A.

4 Q. And you, obviously,

5

6

7

8 A.

9

10

11

12

13

14

15

16 ATC[CPT MORROW]: Thank you, sir.

17 MJ: Anything else from the defense?

18 ADC[MAJ HURLEY]: No, ma'am, other than the last--the disability
19 [sic] to provide , ma'am, we'd object to that
20 under 1001(b)(4).

21 MJ: Okay. Just give me one second, here.

22 EXAMINATION BY THE COURT-MARTIAL

~~SECRET~~

~~SECRET~~

1 Questions by the military judge:

2 Q. Colonel Chesnutt, I know you testified as to this, but
3 these

4 A.

5

6 Q.

7 A.

8 Q.

9

10 A. Yes, ma'am.

11 Q.

12 A.

13

14 Q. And that was after the release of the WikiLeaks cables?

15 A. Specifically,

16

17 MJ: I think that's all I have. Anything based on that?

18 ADC[MAJ HURLEY]: No, ma'am.

19 ATC[CPT MORROW]: No, Your Honor.

20 MJ: Temporary or permanent excusal?

21 ATC[CPT MORROW]: Temporary, Your Honor.

~~SECRET~~

~~SECRET~~

1 [The witness was duly warned, temporarily excused and withdrew from
2 the courtroom.]

3 MJ: Counsel, we said 10 o'clock tomorrow, right?

4 ADC[MAJ HURLEY]: Yes, ma'am.

5 MJ: Okay. I should have the last order with Undersecretary
6 Kennedy ready, probably, in about 10 minutes. So I can either give
7 it to the court reporter or if you just want to come by chambers and
8 get it; whatever works. Anything else we need to address?

9 ADC[MAJ HURLEY]: Ma'am, may we confer with the parties for just
10 a second?

11 A. Yes.

12 [The parties for both sides conferred.]

13 ADC[MAJ HURLEY]: Ma'am, we just wanted to talk to you about the
14 way forward that we reached with respect to this classified evidence
15 and we'll probably use the same procedure tomorrow, as necessary.
16 What we're going to do is write out our objections--write them out--
17 hand-write them because of the--some constraints we have with this
18 classified evidence--the government will type out our objections and
19 then type out their responses on an appropriately classified
20 computer, print that out and then deliver that to you--whatever means
21 the Court would like.

~~SECRET~~

~~SECRET~~

1 MJ: Okay. Why don't we do it this way--will this work: if you
2 can deliver it to me in the morning so--I can't see another way to do
3 that--then I'll have it tomorrow morning. During the course of the
4 day, I'll go through it, I'll have the classified--my classified
5 notes, here, as well, and then just address it piece-by-piece, day-
6 by-day witnesses. Does that work?

7 TC[MAJ FEIN]: Yes, ma'am, we'll complete it tonight and have it
8 ready for Mr. Prather tomorrow morning for when you show up.

9 MJ: All right.

10 ADC[MAJ HURLEY]: The defense has no objection to that course of
11 action, ma'am.

12 MJ: Okay. Anything else we need to address?

13 TC[MAJ FEIN]: No, ma'am.

14 ADC[MAJ HURLEY]: No, ma'am.

15 MJ: Court is in recess until zero--or 1000 tomorrow.

16 [The court-martial recessed at 1511, 6 August 2013.]

17 [END OF PAGE]

~~SECRET~~

1 [The court-martial was called to order at 1012, 7 August 2013.]

2 MJ: Please be seated. Court's called to order. Major Fein,
3 please account for the parties.

4 TC[MAJ FEIN]: Yes, Your Honor. All parties present when court
5 last recessed are present with the only exceptions: Captain Morrow
6 is absent, Captain Overgaard is present.

7 Also, ma'am as of 9:55 this morning, seven members of the
8 media at the media operation center, one stenographer, no media in
9 the courtroom, eleven spectators in the courtroom, the overflow
10 trailer is not being used but it's available.

11 Additionally, Your Honor, yesterday what's been marked as
12 Appellate Exhibit 642 is titled, "The Government Response to Defense
13 Objections under R.C.M. 1001(b)(4)," for Major General Nagata and
14 Colonel Chesnutt dated yesterday, 7 August 2013, and it's classified.
15 Incorporated within that, based off of the agreement of the parties,
16 is also the defense's handwritten filing, the government wrote that
17 out and that's included in Appellate Exhibit 642.

18 Also, at the next recess the government will be having
19 marked the redacted unclassified version of Appellate Exhibit 642.

20 MJ: All right. So just to make sure for the record that we're
21 clear, both sides have agreed that for classified objections the
22 defense will hand write them out, give them to the government, and

1 there will be one, basically, joint filing that includes the defense
2 objections as well as the government's response?

3 CDC[MR. COOMBS]: Yes, ma'am.

4 TC[MAJ FEIN]: Yes, ma'am.

5 MJ: Okay.

6 TC[MAJ FEIN]: Also, ma'am, I apologize, this is an open session
7 of course, it's unclassified and I have the court security officer's
8 open hearing checklist and it will be filed with the Post-Trial
9 Appellate Exhibits.

10 MJ: All right. Thank you. As I said yesterday, the court is
11 prepared to rule on the defense motion for appropriate relief under
12 R.C.M. 1001(b)(4) for Under Secretary Kennedy. I gave that ruling to
13 the parties yesterday so they would be prepared for today. The
14 ruling is as follows:

15 On 5 August 2013, in accordance with the procedures
16 established in the court's ruling, defense motion for appropriate
17 relief under R.C.M. 1001(b)(4) Appellate Exhibit 639, the defense
18 filed the following six specific objections to the testimony of Under
19 Secretary Patrick Kennedy, Appellate Exhibit 636:

20 Also, on 5 August 2013, the government filed a response in
21 opposition, Appellate Exhibit 637. For each defense objection, the
22 government position is below the objection followed by the court's
23 ruling on that objection.

1 One, the testimony relating to the diminution of reporting
2 through diplomats in the field and through those who would speak to
3 Department of State diplomats in various countries. Under Secretary
4 Kennedy indicated that he believed the diminution of reporting was
5 due to a chilling effect caused by the charged leaks in the case.
6 The defense objects to this testimony as not being directly related
7 to or resulting from PFC Manning's misconduct under R.C.M.
8 1001(b) (4).

9 Government's position: Under Secretary Kennedy's opinion on
10 diminution of reporting was based on facts or data perceived by or
11 made known to Under Secretary Kennedy before the hearing. His
12 conclusion was that PFC Manning's misconduct caused a diminution of
13 reporting, which was the natural and probable consequence of PFC
14 Manning's actions, and not based on any intervening event that played
15 the only important part in bringing about the effect.

16 Ruling: A. Under Secretary Kennedy's testimony that there
17 was a diminution in reporting due to chilling effect caused by
18 WikiLeaks' releases of purported Department of State cables given to
19 WikiLeaks by PFC Manning is admissible aggravation evidence under
20 R.C.M. 1001(b) (4) with the caveat: to the extent that Under Secretary
21 Kennedy's testimony is limited to periods directly following the
22 WikiLeaks releases or directly following subsequent media accounts of

1 the WikiLeaks releases in the various countries. It is directly
2 related to and resulting from PFC Manning's offenses.

3 B. The foundation for Under Secretary Kennedy's opinion
4 that PFC Manning's misconduct resulted in the WikiLeaks disclosures
5 of the purported Department of State cables caused a long-term
6 diminution in reporting that continues to date is not based on
7 quantifiable data, it is speculative and inadmissible under M.R.E.
8 403. The court will not consider it.

9 Two, the testimony related to the belief that if we, the
10 United States, do not have the trust of others we cannot get accurate
11 information and that if we, the United States, do not get accurate
12 information we cannot compile a complete product. The defense
13 objects to this testimony as not directly related to or resulting
14 from PFC Manning's misconduct under R.C.M. 1001(b)(4).

15 The government's position: Under Secretary Kennedy
16 provided this information as context for the foundation of his
17 ultimate opinion and this was based on his personal experience and
18 knowledge.

19 Ruling: This is explanatory testimony that falls within the
20 scope of Under Secretary Kennedy's expertise in the use of diplomatic
21 reporting. It is admissible under R.C.M. 1001(b)(4) for that
22 purpose.

1 Three, the testimony related to the belief that non-
2 governmental persons were no longer willing to talk fully and frankly
3 with the United States diplomats due to the charged leaks in this
4 case. The defense objects to this testimony as not being directly
5 related to or resulting from PFC Manning's misconduct under
6 R.C.M. 1001(b) (4).

7 Government position: Under Secretary Kennedy's opinion on
8 the lack of openness of nongovernmental persons was based on facts or
9 data perceived by or made known to Under Secretary Kennedy before the
10 hearing. This conclusion that PFC Manning's misconduct resulted in
11 the unwillingness of non-governmental personnel to talk fully and
12 frankly with the United States and was a natural and probable
13 consequence of PFC Manning's actions and not based on any intervening
14 event that played the only important part in bringing about that
15 effect.

16 Ruling: This opinion testimony is similar to the opinion
17 testimony in One above and is admissible aggravation under R.C.M.
18 1001(b) (4) for the -- a limited duration and time following the
19 WikiLeaks releases or subsequent media accounts of the WikiLeaks
20 releases in the various countries, as set forth in the court's ruling
21 in One above.

22 Four, the testimony related to the belief that some
23 embassies included less information in their reporting than they did

1 before out of the fear that the information would not be protected.
2 Under Secretary Kennedy testified that the act of reporting less
3 information was a self-generated limitation on information from
4 various embassies and not the result of the direction by the
5 Department of State. The defense objects to this testimony as not
6 directly related to or resulting from PFC Manning's misconduct under
7 R.C.M. 1001(b)(4).

8 Government position: Under Secretary Kennedy's opinion that
9 embassies included less information in their reporting was based on
10 facts or data perceived by or made known to Under Secretary Kennedy
11 before the hearing. His conclusion was that PFC Manning's misconduct
12 resulted in embassies including less information was the natural and
13 probable consequence of PFC Manning's actions and not based on any
14 intervening event that played the only important role in bringing
15 about that effect.

16 Ruling: The testimony that PFC Manning's offenses caused
17 some embassies to include less information in their reporting for
18 fear that information will not be protected is admissible under
19 R.C.M. 1001(b)(4) but is limited in time to the periods directly
20 following the WikiLeaks releases or directly following subsequent
21 media accounts of the WikiLeaks releases in the various countries as
22 set forth in the court's ruling in One above. PFC Manning's offenses

1 directly resulted in the decisions by certain embassies to report
2 less information in their cables.

3 Five, the testimony related to the belief that the
4 disclosures had a chilling effect on diplomatic reporting and that
5 the disclosures have had and will continue to have an impact on
6 reporting for some indefinite period. The defense objects to this
7 testimony as not being directly related to or resulting from PFC
8 Manning's misconduct under R.C.M. 1001(b) (4) and also as being
9 speculative.

10 Government position: Under Secretary Kennedy's opinion on
11 the chilling effect of diplomatic reporting and his opinion on the
12 future impact on reporting were based on facts or data perceived by
13 or made known to Under Secretary Kennedy before the hearing. His
14 conclusion was that PFC Manning's misconduct resulted in this
15 chilling effect and the future impact and these results were the
16 natural and probable consequences of PFC Manning's actions and not
17 based on any intervening events that played the only important role
18 in bringing about those effects.

19 Ruling: A. Under Secretary Kennedy's opinion on the
20 chilling effects on diplomatic reporting occurring during periods
21 directly following the WikiLeaks releases or directly following
22 subsequent media accounts is admissible under R.C.M. 1001(b) (4) as
23 directly related to or resulting from PFC Manning's offenses.

1 B. The foundation for Under Secretary Kennedy's opinion
2 that PFC Manning's misconduct resulted in WikiLeaks' disclosures of
3 purported Department of State cables caused a long-term chilling
4 effect on diplomatic reporting that continues to date and will
5 continue into the future is not based on any quantifiable data. It
6 is speculative and inadmissible under M.R.E. 403. The court will not
7 consider it.

8 Six, the testimony that due to the perceived chilling
9 effect on diplomatic reporting, the decrease in information has had a
10 negative effect on policy makers in Washington, D.C. and our
11 interagency partners. Specifically, Under Secretary Kennedy
12 testified that policy decisions are being made based on incomplete
13 information, because other countries choose not to engage, or chose
14 not to engage in full and frank reporting, which reporting is relied
15 upon by policy makers. The defense objects to this testimony as not
16 directly related to or resulting from PFC Manning's misconduct under
17 R.C.M. 1001(b)(4) and also as being speculative. The defense also
18 objects based on foundation since Under Secretary Kennedy did not
19 explain how he is familiar with policy making, the various variables
20 that go into policy making, and how diplomatic reporting fits into
21 policy making. Also, "policy making" is an extremely broad category.
22 Under Secretary Kennedy did not explain what type of policy making he

1 was referring to and certainly he is not an expert on policy making
2 in general.

3 Government position: The government qualified Under
4 Secretary Kennedy as an expert in the fields of "management and
5 operations of the Department of State," and "the use of diplomatic
6 reporting by United States policymakers." The defense did not
7 contest this expertise. Under Secretary Kennedy's opinion on the
8 impact to policy makers in Washington, D.C. and interagency partners
9 was based on facts or data perceived by or made known to Under
10 Secretary Kennedy before the hearing and not speculative in nature.
11 His conclusion was that PFC Manning's misconduct had a chilling
12 effect that negatively affected policy makers, which was the natural
13 and probable consequence of PFC Manning's actions, and not based on
14 any intervening event that played the only important role in bringing
15 about that effect.

16 Ruling: A. Under Secretary Kennedy's testimony about
17 policy making in general, the variables that go into policy making
18 and how diplomatic reporting fits into policy making is within his
19 expertise on the use of diplomatic reporting by United States policy
20 makers and his 40 plus years of working at the highest levels of
21 inter -- of the interagency decision making organizations is
22 admissible, and is admissible to lay the foundation for his opinions
23 in One, Three, Four, and Five above.

1 B. The foundation for Under Secretary Kennedy's opinion
2 that the accused offenses had a negative effect on policy making in
3 Washington, D.C. and our interagency partners and that policy
4 decisions are being made based upon incomplete information because
5 other countries chose not to engage in full and frank reporting,
6 which reporting is relied upon by policy makers, is not based on any
7 quantifiable data, it is speculative and inadmissible under M.R.E.
8 403. The court will not consider it.

9 M.R.E. 403 analysis. Under Secretary Kennedy was properly
10 accepted as an expert in management and operations of the Department
11 of State and in the use of diplomatic reporting. The probative value
12 of those portions of his testimony ruled admissible as aggravation
13 evidence under R.C.M. 1001(b)(4) is not substantially out-weighed by
14 the danger of unfair prejudice under M.R.E. 403. The court has
15 limited the scope of the opinion to the periods directly following
16 WikiLeaks releases or directly following subsequent media accounts of
17 WikiLeaks releases in the various countries. So ordered the 6th day
18 of August, 2013.

19 And I believe that ruling is already an Appellate Exhibit;
20 is that correct? Anything else we need to address before we call the
21 witness?

22 CDC[MR. COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, ma'am. But may the parties have a moment?

1 MJ: Yes.

2 [There was a pause while the trial counsel conferred at the counsel
3 table.]

4 TC[MAJ FEIN]: No, ma'am. No further issues.

5 MJ: Please call the witness.

6 ATC[CPT OVERGAARD]: United States calls Mr. James McCarl.

7 JAMES MCCARL, civilian, was called as a witness for the prosecution,
8 was sworn, and testified as follows:

9 DIRECT EXAMINATION

10 Questions by the assistant trial counsel [Captain Overgaard]:

11 Q. And you are Mr. James McCarl?

12 A. Yes.

13 Q. What is your current position?

14 A. I'm the Chief of the Mission Integration Division for the
15 Joint IED Defeat Organization's Counter-IED Operations Intelligence
16 Integration Center.

17 Q. Okay. You are the division chief, basic -- or the Chief
18 Mission Integration Division? That's what you said?

19 A. That's correct.

20 Q. Okay. And then what does -- and then you said the counter-
21 IED operations integration center?

22 A. Yes.

23 MJ: Chief of -- say that one more time.

1 WIT: Okay.

2 ATC[CPT OVERGAARD]: It was fast for us.

3 WIT: I am the division Chief for the Mission Integration
4 Division, that division is a part of the counter-IED operations and
5 integration center which is a subordinate portion of the Joint IED
6 Defeat Organization.

7 **Questions continued by the assistant trial counsel [Captain**
8 **Overgaard]:**

9 Q. And what is -- how long have you been in that position?

10 A. Almost 6 years.

11 Q. And what is the mission of the Joint IED Defeat
12 Organization or JIEDDO?

13 A. It was originally established to deal with the IED threat
14 that emerged in Iraq and subsequently also in Afghanistan. It has
15 three essential lines of operation. Those are, first, to defeat the
16 device. By that I mean, it is technically applied against -- either
17 to defend against an IED or to detect it. The second one is to train
18 the force how to use that equipment and how to work tactically
19 against IED's. And the third one, in the area where I operating in,
20 is in attacking the network, which is to do the intelligence analysis
21 about how IEDs are employed, who's doing that, and then provide to
22 tactical units a method by which they can strike back at the threat.

1 Q. And then you said that another subset, or the subset under
2 which you work is the JIEDDO Counter-IED Operations Integration
3 Center?

4 A. Operations and Intelligence Integration Center.

5 Q. Can you explain to us what that means?

6 A. It is -- I can. The COIC is what is known as and it
7 essentially handles all of that third line of operation, which is the
8 attack the network portion. And so in my capacity I supervise, at
9 the moment, slightly over seven hundred, at its apex about nine
10 hundred, intelligence and operations analysts, about two hundred of
11 which were forward in Afghanistan and Iraq all the way down to
12 battalion level. And our purpose is to provide analytic support to
13 them in allowing them to attack the threat networks that put out
14 IEDs.

15 Q. And you said you've been the Chief Mission Integration --
16 the Chief for the Mission Integration Division for 6 years?

17 A. Yes. Almost, it will be 6 years in October.

18 Q. Okay. And you're here today to testify as an expert in
19 adversary use of improvised explosive devices or IEDs?

20 A. Yes.

21 Q. And specifically, you will provide specialized knowledge on
22 what purported information was released by the WikiLeaks in CIDNE
23 databases and your opinion on: One, how the adversary can use the

1 information that was released; and two, the changes in enemy IED TTPs
2 following the releases of the purported U.S. Government information?

3 A. Yes.

4 Q. And if any questions that you're asked today, sir, require
5 you to disclose classified information or you believe will require
6 you to disclose classified information, please just let us know and
7 we'll answer -- ask those questions in a closed session.

8 Now, sir, what effects do IEDs have on military efforts?

9 A. Well, it's a matter of record that the IEDs are the number
10 one casualty producer in both Iraq and Afghanistan. It's -- at its
11 apex, probably accounted for about 80% of all the casualties were a
12 result of an IED event. So it sort of goes between 60 and 80% right
13 now. But it's the significant weapon of choice by the threat.

14 Q. And you mentioned the obvious threat in Iraq and
15 Afghanistan, are IEDs used elsewhere against U.S. forces in the
16 world?

17 A. So the answer is yes on two planes. There are a number of
18 IE -- every month between seven hundred and a thousand IEDs go off
19 around the globe in other places. There are places where U.S. forces
20 are on the ground, for example, there are special operations forces,
21 and I would not be able in this form to go into those locations, but
22 there are special operations forces throughout Africa and Latin
23 America who potentially are in contact with those but they're not as

1 prolific against U.S. persons as they are in Afghanistan, but they're
2 certainly prolific against U.S. interest and allies.

3 Q. Where does JIEDDO -- where do they primarily operate?

4 A. Originally we were focused strictly on Iraq and Afghanistan
5 to the forces in contact there. Now we have an expanded portfolio
6 that allows us to -- and we do operate, in support of every one of
7 the combatant commands around the globe.

8 Q. And you said Iraq and Afghanistan were some of the primary
9 places that JIEDDO operated. What do members of JIEDDO do in
10 theater?

11 A. It follows the three lines of operation that I described.
12 So it deploys equipment, both protective equipment -- and that could
13 be for an individual or it could be protective equipment like the
14 MRAPs which were fielded as vehicles that were resistant to IEDs,
15 that is one application. The second one is to train the force. We
16 have trainers who observe the enemy TT and P and then attempt to
17 synthesize that into methods that you can use to counter that. And
18 then the third is where my particular effort is and that is that I
19 have analysts, operations specialists, and analysts all the way down
20 to battalion level whose job it is to expose the network,
21 analytically examine and expose what the enemy network is. The
22 people who build the IEDs, put them out, and make that exposure

1 available to the action arm to attack that network, either kill or
2 capture.

3 Q. And the third line of operation that you described, is that
4 primarily done in theater or is that done stateside as well?

5 A. Well, there's two parts to it. Obviously, the first
6 portion is to understand the network. So the bulk of that is done
7 back here in the U.S. where my effort is to synthesize and integrate
8 intelligence from around the intelligence community and from wherever
9 else we can acquire it, allies, et cetera, that's the see portion,
10 see the enemy portion of that mission. The attacking the network
11 portion, JIEDDO has no authority there. Its position is to empower
12 the combatant commander and on down to his tactical units who do have
13 the authorities. And so we're basically providing that to them with
14 a forward presence that allows them to attack the network there, in
15 theater.

16 Q. And what types of data do you use to compile this analysis?

17 A. It's an ever-expanding and changing set, but we take about
18 two hundred different data feeds. Many of them are the traditional
19 data feeds that you would get from the intelligence community, the
20 SIGACTS that come out of the combatant command and the tactical units
21 in the field. But we also use nontraditional types of intelligence
22 or information as well. Business intelligence, threat finance, all
23 of those things, because they help expose portions of the network

1 that you wouldn't see otherwise. So as a dynamic -- it's a dynamic
2 piece, it changes all the time, but roughly about two hundred
3 different data feeds.

4 Q. Did that include Department of State Cables?

5 A. It did.

6 Q. And basically all the INTs?

7 A. Yes ----

8 Q. Depending on whether or not ----

9 A. ---- every ----

10 Q. ---- they're relevant?

11 A. Everything that comes out of the intelligence community
12 that is available to -- that is available we will use and have access
13 to.

14 Q. And who typically tasked JIEDDO with preparing analytical
15 products?

16 A. There are two sources. One would be sort of the
17 programmatic community who is -- who are attempting to either create
18 a new or produce a new piece of equipment. Whether it be an
19 electronic warfare system to defeat a remote controlled IED, or it
20 could be, but more often in my case, it is a bottom up piece that
21 comes from the supported unit on the ground in the field. And so
22 they would ask us, they could ask us any number of types of
23 analytical questions and we'll provide that support.

1 Q. So it typically -- does it typically come from the
2 combatant commands?

3 A. It typically comes from the units in contact for us. Now
4 that's -- there are no absolutes in this. We get requests from the
5 combatant commands themselves at the, you know, the four-star level.
6 We have gotten requests from support outside of DOD, State Department
7 for example. But the bulk, you know, put it in perspective, since we
8 have, we have been in business, we have done eighteen thousand plus
9 requests for support. Each one of those is an analytical effort of
10 some kind, some are large, some are small. But the bulk of that, the
11 vast majority of that comes from the tactical units in the field who
12 are looking for support on a counter-IED problem that they're trying
13 to solve.

14 Q. And when you're responding to these requests for analysis
15 from tactical units, could you give an example of how that would
16 work? What -- how would you receive it and then what you would do
17 with that information?

18 A. Right. Well, I'll give you two examples just so -- because
19 they're slightly different. Unit going into the field to take up a
20 position and own the battle space will typically ask us questions,
21 like, "Where are the IEDs going off?", "What are the high density
22 areas?", "Where can we expect to see IEDs?", "What kinds of IEDs will
23 these be?", "Will they be pressure plate, command wire, remote

1 control, all of the above? Who is the network that's supplying this?
2 Do we know the names of the people in that network? Where do they
3 bed down? Where are their compounds of interest? And so, do you
4 have of a pattern of life on them so that we can strike that now?"
5 So tha -- a lot of that is about situational awareness because
6 they're going there the first time.

7 Longer term battle space owners will typically begin to
8 integrate our products with their planning for their next operation.
9 So we typically plan -- we typically support operations on a weekly
10 basis. They will say back to us, "We're going to go into this
11 particular area, we need to know what to expect in there." We'll
12 give them a build-out similar to the one I just described, but it
13 will help them shape their ISR and then subsequent their op ----

14 Q. What is ISR?

15 A. Their intelligence, surveillance, and reconnaissance. So
16 before an operation goes down, typically they have what's in the
17 vernacular in the theater, called the ISR soak. So it might be a
18 week, could be more, in which they will assemble over the expected
19 area of operation all of the intelligence and surveillance and
20 reconnaissance assets that they need to begin to understand what is
21 happening on that particular piece of terrain. We will help steer
22 that because we have our own understanding of that terrain and our
23 own analyses that will point that ISR to particular places. And then

1 support subsequently the pattern of life on individuals in there that
2 they're going after.

3 Q. And sir, before you joined JIEDDO what was your career?

4 A. I was -- served for 30 years in the United States Army,
5 retired as a colonel. Commanded a battalion and brigade. Had four
6 different combat tours in various places. And most recently stood up
7 and ran the INSCOM intelligence and operations center, as well as I
8 ran, for 2 years, the Army's Red Team for -- directly for the Vice
9 Chief of Staff of the Army at that time, General Cody. And then the
10 last thing before I retired, I served a tour in Afghanistan as a
11 Chief of Staff for the national mission force SOTF, task forces in
12 Afghanistan.

13 Q. And did you say your branch, sir?

14 A. I was military intelligence.

15 Q. Could you tell us a little bit more about the Red Team --
16 the Red Team projects that you worked on?

17 A. Right. So the idea, when General Schoomaker was the Chief
18 of Staff of the Army he was a big believer in Red Team and he
19 institutionalized this idea by creating a Red Team University that
20 taught people how to do it. And its purpose is to emulate the
21 threat. And so it allows the commander to ask a slightly different
22 question than a pure intel question. For example, I'm a commander,
23 I'm going to be on this particular piece of terrain or I'm going to

1 be doing this particular activity, if you were the enemy, how would
2 you react under these conditions, at this time, what kind of
3 scenarios would we see from that? That allows commanders to think
4 through mitigation strategies and how they might deal with those
5 possible scenarios and so as a Red -- as the Chief of the Army's Red
6 Team for 2 years, essentially I spent about once a month I spent a
7 session with the Chief of Staff, Vice Chief, and all the principals
8 in the bunker at the Pentagon sparring with them as their adversary.
9 And it included both Jihadist radical philosophy and IED component
10 parts to it.

11 Q. Did you also -- did you work with JIEDDO at all in that
12 capacity?

13 A. I did. As JIEDDO began to emerge as an organization -- it
14 got its start as an Army organization, transitioned to a joint
15 organization. So in its early days we did several projects for
16 JIEDDO -- Red Team projects.

17 Q. And sir, as one of the senior intel officers at JIEDDO, who
18 relies on your expertise in the adversary use of IEDs?

19 A. Well, all of the, essentially all of those requests for
20 support, every one of those things is my responsibility. So by
21 extension at any one time I've got two hundred analytic projects that
22 are -- that rely on my support and my expertise because I do, and am
23 responsible for, the quality control of those products going down to

1 the tactical commanders. That can be division commander, corps
2 commander, or even down to platoon leader. And within the JIEDDO
3 headquarters itself, I am one of the senior intelligence officers
4 there so, therefore, the JIEDDO director also uses me. For example,
5 I was his subject matter expert just last week in the briefing to
6 Congress.

7 ATC[CPT OVERGAARD]: And ma'am, we, at this time, offer Mr.
8 McCarl as an expert in adversary use of IEDs.

9 ADC [MAJ HURLEY]: No objection, ma'am.

10 MJ: All right. So accepted.

11 **Questions continued by the assistant trial counsel [Captain**
12 **Overgaard]:**

13 Q. Sir, are you familiar with the WikiLeaks release of
14 purported U.S. Government information?

15 A. Yes.

16 Q. And when did you first become aware of that alleged release
17 of U.S. Government information?

18 A. Well, just like the rest of the general public, when it was
19 in the news.

20 Q. Was JIEDDO given any tasking in the aftermath of the
21 alleged release?

22 A. Yes. In September of 2010, CENTCOM, Deputy J-3, sent a
23 request for support to us and it asked us to take a look at a

1 selected set, they selected them, of leaked reports. There were
2 three thousand seven hundred and ninety. And to provide to them a
3 JIEDDO evaluation of what we thought the impact was as a result of
4 those leaks from an IED perspective.

5 Q. In the three thousand seven hundred and ninety reports that
6 you mentioned, where were they from?

7 A. Those were all from the SIGACTS from Afghanistan.

8 Q. Did they do another tasking on any ----

9 MJ: I'm sorry, what was the number?

10 ATC[CPT OVERGAARD]: ---- three thousand -- did I switch it?

11 WIT: Three thousand seven hundred and ninety.

12 ATC[CPT OVERGAARD]: Okay.

13 MJ: Thank you.

14 **Questions continued by the assistant trial counsel [Captain**
15 **Overgaard]:**

16 Q. Did they also ask you to look at any of the CIDNE-I
17 SIGACTS?

18 A. They did. That followed in the next part of the following
19 year in early 2011. They came back to us and said, "Here's, you
20 know, here's a hundred and eleven thousand leaked SIGACTS from Iraq.
21 We'd like you to do the same thing."

22 Q. And why was it necessary to determine what IED related
23 information may have been compromised in the purported devices?

1 A. Well, it is the same -- it's the same principles as you
2 would apply to any of this. You are absolutely -- it's essential to
3 understand what your OPSEC loss is, what your adversary may be able
4 to glean from that in order to anticipate, you know, what their
5 actions are going to be and then subsequently deal with them.

6 Q. And sir, what role did you play in this tasking?

7 A. Well, as the Mission Integration Division Chief, I handled
8 the quality control portion of this. So I assigned out to three
9 different sub-elements of my division the analytic process, "I need
10 you, the ORSA guys, to do the statistical analysis on." I needed the
11 Red Team guys to take that perspective and look at how the enemy
12 might react to it and then I asked my open source guys to take a look
13 at what reflections and what you might expect to see from both allies
14 and from the Jihadists themselves. So we assigned those three
15 things, assigned -- I assigned an integrator, a lead for this to put
16 the product together. And then, like all of our products, they get
17 two quality control checks before they go out. And so I was involved
18 really more at that point as the supervisor looking at the quality
19 control. I was not the analyst who did the reading.

20 Q. So you were -- so just to break it down, you were in charge
21 of these three different analytic teams who were conducting the
22 analysis?

23 A. That's correct.

1 Q. And you said there was the ORSA was the first one? What
2 does ORSA mean?

3 A. That's the Operational Research Systems Analysis. It's a
4 essentially a capability that, in this case, we're using to do
5 statistical analysis to and to help us pull from these gigantic
6 mounds of data how we can sort it and understand it so that we're
7 using statistical analytic tools to help us rack and stack the
8 materials and to look for things in there that then key the analyst.

9 Q. And then you also said you had the Red Team, which looked
10 at what the enemy would do if they had the information?

11 A. Correct. So if you had a particular vulnerability you
12 would -- the Red Team would give a perspective on, "If we were the
13 threat and we had this, how might we react?" So this provides back
14 to the customer some understanding of what types of scenarios might
15 play out as a result of this.

16 Q. And the customer in this case was CENTCOM J-3?

17 A. Correct.

18 Q. And then the third team that you had said was the open
19 source team?

20 A. Correct.

21 Q. So what was their primary focus?

22 A. Well, again, what we're looking for there was the sweep
23 through all of reflections that we could find in open source,

1 particularly the Jihadist web sites but also in open news reflections
2 in allies. For example, how were the Pakistanis, how were the
3 Afghani governments, how were they reacting to this. So it gave us
4 some understanding or perspective on how they, you know, viewed this.

5 Q. Okay. Going back to the ORSA. You said they sorted and
6 understand and used some analytic statistical processes to make their
7 determinations. Could you walk us through what they did?

8 A. Okay. Not being an ORSA I'm going to give you a general
9 description of how this goes. But essentially when you have a
10 hundred and eleven thousand different leaked reports, you have to
11 have a method by which you -- you have to have somewhere to start,
12 because you simply don't have time to read every single message. So
13 the analysts began, read about three thousand roughly, correction,
14 about two thousand reports and from that got an understanding of what
15 the main key ideas and key words would be in what we were looking at
16 that were associated with the task, the analytic task of -- that we
17 were assigned. The ORSA guys then wrote a script -- helped write a
18 script that would then allow the computer to rack and stack those
19 different reports into different categories or subject areas where we
20 could then begin to examine those each as an idea as opposed to just
21 randomly sweeping through a bunch of ideas and hoping that you can
22 figure it out later on.

1 Q. And then after they were pulled through the -- well,
2 through the reading and computer process, did a person read all of
3 that information?

4 A. They did. They read the highest end sampling of those. As
5 well, there was a -- sort of a cut off line as to how much you could
6 read of it. But they take the ones that had the most of the key
7 words, raised level of hits, from that and then they read those and
8 provided the analytic work from that.

9 Q. And you said they were separated into basically subject --
10 different subject areas. Was the severity of threat evaluated at
11 all?

12 A. Yes. There was three categories of severity that we
13 applied.

14 Q. And what were those three areas, without going into any
15 detail?

16 A. Well, there was high, medium, and low.

17 Q. Okay. And sir, how long did the review last of all this --
18 a hundred and fifteen thousand approximately, SIGACTS?

19 A. Well, there are a number of events going on concurrently
20 and some sequentially and then some with breaks in them, so it's not
21 easy to give you a linear description. I'll give you -- here's our
22 calculation, is that we spent 855 man hours, which equates to about
23 roughly \$200,000 to pay all those people to do that work.

1 Q. And sir, what would these individuals, these analysts, have
2 been doing if they weren't conducting this review?

3 A. Well, they would have been supporting tactical units in the
4 field.

5 Q. Did this impact the primary mission of JIEDDO?

6 A. Well, it impacted our mission because we had to divert
7 resources away from the tactical units in order to be able to do
8 this. I can't quantify what that is, but it's intuitively obvious.

9 ATC[CPT OVERGAARD]: All right. That's the end of our open
10 direct, ma'am.

11 ADC [MAJ HURLEY]: Ma'am, we don't have any open cross-
12 examination.

13 MJ: I just have one brief question.

14 **EXAMINATION BY COURT-MARTIAL:**

15 **Questions by the military judge:**

16 Q. And if you can't answer this in an open setting, please
17 don't, but how long did each of these reviews take?

18 A. Rough order of magnitude's about three weeks on the first
19 one. The second one was much larger so it took a little longer,
20 about maybe four weeks just to get it underway.

21 Q. Okay. So to get it underway?

1 A. Well, I take it back. Just to get it underway to the point
2 that we could then take a look at the -- and rack and stack it into a
3 particular product.

4 Q. How long until the end product?

5 A. About 5 weeks I'd say.

6 MJ: Any follow-up based on that?

7 ATC[CPT OVERGAARD]: No, ma'am.

8 ADC[MAJ HURLEY]: No, ma'am.

9 MJ: All right. So the government wants to move into a closed
10 session; is that correct?

11 ATC[CPT OVERGAARD]: Yes, ma'am.

12 TC[MAJ FEIN]: And ma'am, this is pursuant to your previous
13 order Appellate Exhibit 550.

14 MJ: Thank you. Now I'd like the parties to confer so I can
15 advise the public when you anticipate that the next open session will
16 be.

17 [There was a pause while the counsel conferred at their counsel
18 tables.]

19 And remember, yesterday I believe was about a half an hour
20 early that -- so be generous with your time.

21 TC[MAJ FEIN]: Yes, ma'am.

22 ADC[MAJ HURLEY]: 1500, ma'am.

23 TC[MAJ FEIN]: 1500, ma'am.

1 MJ: All right. Members of the public, we are now going to
2 proceed into closed session. The closed session is not going to last
3 until 1500 but there are additional preparatory steps that counsel
4 need to take before we call the next witness. So we're going to have
5 the next open session at 1500 or 3:00 this afternoon. How long of a
6 recess do we need?

7 TC[MAJ FEIN]: 20 minutes, ma'am.

8 MJ: All right. Mr. McCarl, during the recess please don't
9 discuss your testimony with anyone. We'll allow you to go ahead and
10 step down.

11 And anything else we need to address before we recess the
12 court?

13 TC[MAJ FEIN]: No, ma'am.

14 MJ: Court is in recess.

15 [The court-martial recessed at 1056, 7 August 2013.]

16 [END OF PAGE]

Pages 12162 through 12226 of this transcript are classified “SECRET”. This session (7 August 2013, Session 1) is sealed for Reasons 2 and 3, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.

Pursuant to AE 550, the unclassified and redacted version follows.

~~SECRET~~

1 [The court-martial was called to order at 1139, 7 August 2013.]

2 MJ: Court is called to order.

3 Let the record reflect that all parties present when the
4 Court last recessed are again present in court. The witness is on
5 the witness stand.

6 Major Fein, please announce the status of the hearing.

7 TC[MAJ FEIN]: Yes, ma'am. Ma'am, this is a closed session,
8 classified at the SECRET level. The court security officer completed
9 a closed hearing checklist which will be filed with the post-trial
10 allied papers. Also present with the parties is the bailiff, the
11 Court's paralegal, members of the defense team, members of the
12 prosecution team, and court security.

13 MJ: Captain Overgaard?

14 ATC[CPT OVERGAARD]: Yes, ma'am.

15 JAMES McCARL, civilian, already on the stand as a witness for the
16 prosecution, was reminded of his oath, and testified as follows:

17 DIRECT EXAMINATION

18 Questions by the assistant trial counsel [CPT OVERGAARD]:

19 Q. In the open session we talked about the severity of the
20 threat that was evaluated by your team. Could you go into and
21 explain, first, what low severity meant?

~~SECRET~~

~~SECRET~~

1 A.

2

3

4

5 Q. Okay. And then, you said, Could you
6 tell us what that means?

7 A.

8

9

10

11 Q. And finally,

12

13 A.

14

15

16

17 MJ: Say that one more time.

18 WIT:

19

20

21

~~SECRET~~

SECRET

1

2

3 Q.

4

5 A.

6 Q.

7 A.

8 Q.

9

10 A.

11 Q.

12 A.

13 Q.

14

15 A. Correct.

16 Q. And,

17

18 A.

19 Q. And, what did you do after you determined--you made these
20 determinations, what happened next?

21 A. So, the entire product was packaged together. You are
22 asking about process now? Are you talking about disposition?

SECRET

~~SECRET~~

1 Q. Yes, sir.

2 A.

3

4

5

6

7

8

9

10 Q. And sir,

11

12

13 A.

14

15

16

17

18

19

20

21

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

MJ: You said, are you talking about one?

WIT: I am sorry, well in this case she asked for an example,

, correction, it was a--I am
thinking about something different. A series---actually a series of
messages in there that identified that.

Q.

A. Yes.

Q.

A. I do not recall which one it was. I think it actually was
in those but that is a faint recollection that it was in both.

Q. And sir,

Was there--could you give an example,
for example,

Q.

~~SECRET~~

~~SECRET~~

1

2

3

4

5

6

7

8

9

10 Q. And sir, in your opinion,

11

12 A.

13

14 Q. Yes, sir.

15 A.

16

17

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Q.

A.

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Q.

A.

ADC[MAJ HURLEY]: Objection, ma'am.

MJ: Yes?

ADC[MAJ HURLEY]:

MJ: Got it.

ADC[MAJ HURLEY]: Sorry to interrupt, Your Honor.

MJ: That is fine. Go ahead.

A. So, what would you like me--how do you want me----

Q.

A.

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

ADC[MAJ HURLEY]: Pardon me, ma'am.

MJ: Yes?

ADC[MAJ HURLEY]: 1001(b)(4).

MJ: Got it.

Q.

A.

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Q. So, talking about those specific examples,

A.

MJ: Yes? Hold on just a moment.

ADC[MAJ HURLEY]: Ma'am, the hand gestures of the witness, I have the same question.

MJ: Okay, I can't see them.

WIT: Okay, so----

ADC[MAJ HURLEY]: He said,

~~SECRET~~

~~SECRET~~

1 MJ: Describe for the record please.

2 A.

3

4

5 Q. Thank you, sir.

6 A.

7

8

9 MJ: What do you mean by

10 A.

11

12

13

14

15

16

17

18

19

20

21

22

~~SECRET~~

~~SECRET~~

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15 Q.

16

17 A.

18

19 Q. Okay.

20 A.

21

22

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

Q. Yes, sir. So, in your opinion,

A.

Q.

A.

MJ: How many?

A.

~~SECRET~~

~~SECRET~~

1 ADC[MAJ HURLEY]: Ma'am, if we may just put this on the record
2 and then obviously reiterate in our filing. We would make an
3 objection under 1001(b)(4). Also, the speculative nature of the
4 testimony that Mr. McCarl just rendered and we believe it also
5 exceeds the foundation of his expertise.

6 MJ: Okay, on the final basis, that is overruled.

7 But go ahead, okay.

8 Q. Sir, you said the And, you talked
9 about--you said,

10

11

12 A. It runs generally parallel. We just looked at it from
13 2009. We went back and looked back at the numbers reported--

14

15 So, they run something in a parallel
16 course.

17 O.

18 A. Correct.

19 O.

20

21 A. It is.

22 Q.

~~SECRET~~

~~SECRET~~

1 MJ: Let me stop you there.

2 WIT:

3 MJ: Thank you.

4 WIT: I'm sorry. Say your question again, I'm sorry.

5 Q.

6

7 A.

8

9

10

11

12

13 ATC[CPT OVERGAARD]: One moment please.

14 [The trial counsel conferred.]

15 ATC[CPT OVERGAARD]: Thank you, sir; ma'am.

16 Q.

17

18

19 A. Well, in all of those categories they were there,

20

21

22

~~SECRET~~

~~SECRET~~

1 MJ: , what?

2 WIT:

3 MJ: Okay.

4 WIT: When I say,

5 MJ: Okay.

6 A.

7

8

9

10

11

12

13

14

15

16

17 ADC[MAJ HURLEY]: Ma'am, the same 1001(b)(4) objection.

18 MJ: Okay.

19 Q. And, you said that was

20

21 A. Yes.

22 Q. Did you

~~SECRET~~

~~SECRET~~

1 A.

2 Q.

3

4

5 A.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

~~SECRET~~

~~SECRET~~

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Q. In that movement away, did that start after WikiLeaks, or after the release of that Department of State cable?

A. That really began within the last, the significant move, really began within the last year, within the last year.

ADC[MAJ HURLEY]: Pardon me----

MJ: I have got the objection.

ADC[MAJ HURLEY]: Thanks, ma'am.

MJ: Let me just stop you there and ask you this question then. If it started this year, how do you correlate that with WikiLeaks release?

WIT:

~~SECRET~~

~~SECRET~~

1

2

3 MJ: All right, thank you.

4 DIRECT EXAMINATION CONTINUED:

5 Q.

6

7

8

9 A.

10

11

12

13

14

15 A.

16

17

18

19

20

21

22

~~SECRET~~

SECRET

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

ADC[MAJ HURLEY]: Captain Overgaard--

ATC[CPT OVERGAARD]: No further questions, thank you.

MJ: Defense?

ADC[MAJ HURLEY]: Yes, ma'am. Mr. McCarl, ma'am, it's going to take a second to get organized, if that's okay?

MJ: That's fine.

CROSS EXAMINATION

Questions by the assistant defense counsel [MAJ HURLEY]:

Q. Good morning, Mr. McCarl.

A. Good morning.

Q. Sir,

A.

Q.

A.

Q.

SECRET

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.